Docket for 02-1689

No. 02-1689	Status: ARGUED
Title:	Grupo Dataflux, Petitioner v. Atlas Global Group, et al.
Docketed:	May 19, 2003
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(01-20245)
Decision Date:	November 22, 2002
Rehearing Denied:	February 17, 2003

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 14 2003	Petition for writ of certiorari filed. (Response due June 18, 2003)
May 29 2003	Order extending time to file response to petition to and including July 18, 2003.
Jul 18 2003	Brief of respondents Atlas Global Group, et al. in opposition filed.
Jul 24 2003	Reply of petitioner Grupo Dataflux filed.
Jul 30 2003	DISTRIBUTED for Conference of September 29, 2003.
Oct 6 2003	DISTRIBUTED for Conference of October 10, 2003.
Oct 14 2003	Petition GRANTED.
Oct 28 2003	Record received from the U.S.C.A. for the 5th Circuit and the U.S.D.C for the Southern District of Texas. (1 box)
Nov 26 2003	Joint appendix filed.
Nov 26 2003	Brief of petitioner Grupo Dataflux filed.
Dec 10 2003	SET FOR ARGUMENT Wednesday March 3, 2004.
Dec 17 2003	CIRCULATED.
Dec 23 2003	Extension of time within which to file respondents brief on the merits to and including January 5, 2004.
Jan 5 2004	Brief of respondents Atlas Global Group, Oscar Robles-Canon, and Francisco Llamosa filed. (Distributed)
Feb 6 2004	Reply of petitioner Grupo Dataflux filed. (Distributed)
Mar 3 2004	Argued. For petitioner: William J. Boyce, Houston, Tex. For respondents: Roger B. Greenberg, Houston, Tex.

Supreme Court, U.S.
FILED

(1)

No. 02-021689 MAY 14 2003

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GRUPO DATAFLUX,

Petitioner,

v.

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals err by creating a new exception to the longstanding rule that diversity jurisdiction must be determined based on a party's citizenship and circumstances as they existed at the time suit was filed?

2. Did the court of appeals err by allowing a unilateral change in a party's citizenship during the course of litigation to create diversity jurisdiction that did not exist at the time suit was filed?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below are:

Atlas Global Group, L.P. ("Atlas") (plaintiff/counter-defendant/respondent);

Oscar Robles-Canon ("Robles-Canon") (counter-defendant/respondent);

Francisco Llamosa ("Llamosa") (counter-defendant/respondent); and

Grupo Dataflux ("Dataflux") (defendant/counter-claimant/petitioner). Atlas incorrectly sued Dataflux, S.A. de C.V. as Grupo Dataflux. The parties have stipulated for the purposes of this case only that Grupo Dataflux can be considered the same company as Dataflux, S.A. de C.V.

CORPORATE DISCLOSURE STATEMENT

Dataflux is a Mexican corporation with its principal place of business in Mexico. Dataflux's parent corporation is Grupo Dataflux, S.A. de C.V. Grupo Dataflux, S.A. de C.V. is not the same entity as Grupo Dataflux. Grupo Dataflux, S.A. de C.V. is a publicly traded company on the Bolsa Mexicana deValores.

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Dataflux files this petition for writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The trial court's order of dismissal and order denying Atlas' motion to alter or amend the judgment are unpublished. The trial court's orders were entered in Civil Action No. H-97-3779; *Atlas Global Group, L.P. v. Grupo Dataflux*; in the United States District Court for the Southern District of Texas, Houston Division. *See* App. B & C. The court of appeals' opinion is published at 312 F.3d 168 (5th Cir. 2002). *See* App. A.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on November 22, 2002. A petition for rehearing en banc and petition for panel rehearing were timely filed. The petitions were denied on February 17, 2003. *See* App. D. This Court has jurisdiction under 28 U.S.C. § 1254(1). On March 25, 2003, the Fifth Circuit stayed issuance of its mandate pending the filing of this petition pursuant to Federal Rule of Appellate Procedure 41(d)(2).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the federal diversity statute, 28 U.S.C. § 1332, are reproduced in the appendix to this petition. *See* App. E.

STATEMENT OF THE CASE

Atlas sued Dataflux in the United States District Court for the Southern District of Texas, alleging claims for breach of contract and quantum meruit. *Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168, 169-70 (5th Cir. 2002). Jurisdiction was predicated solely on diversity under 28 U.S.C. § 1332. *Id.* at 170. Neither constitutional minimum diversity nor statutory complete diversity existed at the time Atlas filed its complaint. *Id.* Atlas is a limited partnership created under Texas law, and Dataflux is a Mexican corporation. *Id.* at 169.

At the time Atlas filed its complaint, its partnership was comprised of five members: (1) Bahia Management, L.L.C. (a Texas limited liability company); (2) Capital Financial Partner, Inc. (a Delaware corporation); (3) HIL Financial Holdings, L.P. (a Texas limited partnership); (4) Francisco Llamosa (a Mexican citizen); and (5) Oscar Robles-Canon (a Mexican citizen). *Id.* at 170. Under *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990), Atlas is deemed to be a citizen of each jurisdiction in which its partners reside. Thus, at the time the complaint was filed, diversity did not exist between Atlas (which was deemed to be a citizen of Mexico) and Dataflux (a Mexican corporation). *Atlas Global Group, L.P.*, 312 F.3d at 170; *see also Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1986) ("Diversity does not exist where aliens are on both sides of the litigation.").

Shortly before trial, Atlas completed a business transaction in which Llamosa and Robles-Canon (the two Mexican citizens) were removed as partners. 312 F.3d at 170. Based on that change, the parties were diverse by the time of trial. *Id.*

The parties consented to try the case before United States Magistrate Judge Frances H. Stacy pursuant to 28 U.S.C.

§ 636(c). After a six-day jury trial, the jury found that Dataflux breached a contract with Atlas and awarded damages. *Id.* After the jury's verdict but prior to the trial court's entry of judgment, Dataflux moved to dismiss the suit for lack of jurisdiction. *Id.* Dataflux argued that diversity jurisdiction did not exist at the time Atlas' complaint was filed because Dataflux and two of Atlas' partners (Llamosa and Robles-Canon) were Mexican citizens. *Id.* The United States Magistrate Judge granted Dataflux's motion to dismiss and denied Atlas' motion to alter or amend the judgment. *Id.* Atlas appealed. *Id.*

In a 2-1 decision, the United States Court of Appeals for the Fifth Circuit reversed the trial court's dismissal order and remanded the case "with instructions to the district court to enter judgment in favor of Atlas." *Id.* at 174. The panel majority (Judges Carl E. Stewart and Fortunato P. Benavides) held that the trial court erred in dismissing Atlas' suit for lack of jurisdiction because the lack of diversity between the parties at the time suit was filed was subsequently cured by Atlas' unilateral change of citizenship prior to trial, and neither the parties nor the trial court identified the absence of diversity jurisdiction before the verdict was returned. *Id.* Judge Emilio M. Garza dissented. *Id.* at 174-78. Dataflux filed a petition for rehearing en banc and petition for panel rehearing, and those petitions were denied.[1]

---

1. In its petition for rehearing en banc, Dataflux asked the court of appeals to review en banc the merits of the panel majority's decision to reverse the trial court's dismissal order. In a separate motion for panel rehearing, Dataflux asked the panel majority to modify its instruction to "enter judgment in favor of Atlas" and to order, instead, that the case be remanded for further proceedings not inconsistent with the majority's holding. The latter instruction would be consistent with the procedural history of the underlying proceeding in which the trial court's dismissal order was entered prior to the entry of judgment on the jury's verdict.

REASONS FOR GRANTING THE PETITION

Dataflux's petition for writ of certiorari should be granted because the Fifth Circuit panel majority's creation of a new exception to the general rule governing the determination of diversity jurisdiction: (1) conflicts with longstanding precedent of this Court; (2) constitutes an unwarranted expansion of this Court's decisions in *Caterpillar, Inc. v. Lewis* and *Newman-Green, Inc. v. Alfonzo-Larrain*; (3) creates a circuit split with the D.C. Circuit; and (4) undermines fundamental public policy interests and principles of federalism.

I. The Fifth Circuit's Decision Conflicts With This Court's Longstanding Limits on Diversity Jurisdiction

Federal diversity jurisdiction is determined based on the parties' citizenship and circumstances as they exist at the time suit is filed. *Dole Food Co. v. Patrickson*, 538 U.S. __, 155 L. Ed. 2d 643, 654 (2003) ("It is well settled . . . that federal-diversity jurisdiction depends on the citizenship of the parties at the time suit is filed"); *Anderson v. Watt*, 138 U.S. 694, 702-03 (1891) ("[T]he [jurisdictional] inquiry is determined by the condition of the parties at the commencement of the suit"). Consistent with this rule, this Court has never held that unilateral changes in a party's citizenship after suit is filed can retroactively create diversity jurisdiction.

In this case, the panel majority created a new exception to these longstanding limits on diversity jurisdiction that directly conflicts with this Court's precedents. The panel majority held that a party's unilateral change of citizenship after suit is filed retroactively creates diversity jurisdiction if:

> (1) an action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met,

> (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling has been made by the court, and
>
> (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured.

Atlas Global Group, L.P., 312 F.3d at 174.

This new exception directly conflicts with this Court's decisions in *Anderson* and *Dole Food Company*, in which this Court established and reaffirmed its bright-line rule requiring diversity jurisdiction to be determined based on circumstances as they existed at the time suit was filed. The Fifth Circuit's decision replaces that rule with a new, ill-defined standard allowing a party to unilaterally create diversity jurisdiction at any time before a verdict is rendered, or before "a dispositive ruling has been made by the court," if the opposing party or trial court does not identify the jurisdictional defect at the outset of litigation.

By unleashing a new, broader exception to the general rule requiring diversity jurisdiction to be determined based on the party's citizenship and circumstances as they existed at the time suit was filed, the Fifth Circuit's decision also conflicts with this Court's decisions in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996) and *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). As shown below, this Court upheld the application of the general rule governing the determination of diversity jurisdiction in *Caterpillar* and *Newman-Green* except under narrow circumstances which do not apply under the facts of this case.

In addition to violating these longstanding limits on diversity jurisdiction, the panel majority's decision also conflicts with other well-established rules governing subject matter jurisdiction. First, it is black-letter law that parties cannot waive or consent to subject matter jurisdiction when it does not exist and may even challenge the existence of subject matter jurisdiction for the first time on appeal. As stated in *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982):

> [N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.

(citations omitted). Second, by allowing a plaintiff to file suit first and establish jurisdiction later, the court of appeals' decision conflicts with the rule that a party asserting federal jurisdiction bears the burden of overcoming the presumption that a claim lies outside the federal courts' limited jurisdiction. *See, e.g., Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

Individually and in concert, these conflicts demonstrate that the panel majority's new rule is a dramatic departure from established law.

II. The Fifth Circuit's New Exception to the Longstanding Limits on Diversity Jurisdiction Goes Well Beyond Any Exception Previously Recognized By This Court

Review of the panel majority's decision is necessary because it creates a new exception to the longstanding limits on diversity jurisdiction that goes well beyond any exception previously recognized by this Court. The panel majority acknowledged the general rule requiring diversity jurisdiction to be determined based on the parties' citizenship and circumstances as they existed at the time suit is filed, but concluded that a departure from this rule was warranted. The panel majority erroneously relied upon this Court's decisions in *Caterpillar* and *Newman-Green* as support for such a departure. As shown below, neither *Caterpillar* nor *Newman-Green* supports the new exception adopted in this case.

A. *Caterpillar* Does Not Authorize the Fifth Circuit's New Exception

Caterpillar does not abrogate the general rule that if diversity did not exist at the time suit was filed, it cannot be created by a party's later change of citizenship. This Court merely considered whether "the absence of complete diversity at the time of removal is fatal to federal court adjudication." *Caterpillar, Inc.*, 519 U.S. at 64.

The suit at issue in *Caterpillar* was filed in state court and then removed to federal court based on diversity jurisdiction. *Id.* at 64-65. The plaintiff moved to remand, arguing that the federal district court lacked jurisdiction because a non-diverse defendant who had substantially settled the claims against it had not yet been dismissed. *Id.* The trial

court refused to remand the case. *Id.* at 66. Shortly before trial, the court dismissed the non-diverse defendant. *Id.* Judgment was entered in favor of the remaining defendant. *Id.* at 67. The Sixth Circuit reversed and vacated the judgment, holding that the case was improvidently removed. *Id.* at 68. This Court held that a trial court's error in failing to remand an improperly removed case is not fatal to the ensuing final judgment if federal jurisdictional requirements are met when judgment is entered. *Id.* at 64.

Caterpillar does not support the new exception created by the panel majority. *Caterpillar* merely addressed the dismissal of a party following removal; it did not address the effect that should be afforded a party's unilateral change in citizenship after suit is underway. *Id.* Neither the principal parties in *Caterpillar* nor their citizenship changed. Here, in contrast, Atlas unilaterally altered its citizenship long after suit was filed by removing its non-diverse partners. *Atlas Global Group, L.P.*, 312 F.3d at 170.

The removal context in which *Caterpillar* arose involves rules and policy considerations that differ from those at issue when a litigant invokes diversity jurisdiction in a case originally filed in federal court. Unlike a party's unilateral decision to change its citizenship, the procedure for removal and dismissal of parties is subject to significant judicial oversight. *Caterpillar, Inc.*, 519 U.S. at 77. The removal must be able to withstand the scrutiny prompted by a motion to remand, and the trial court must address any motions to dismiss a party. *Id.* Because the trial court determines whether the procedural requirements for removal have been met, the prospects for jurisdictional manipulation are diminished. *Id.* *Caterpillar* relied on this point and concluded that the likelihood of manipulation would be lessened because the

removing party would have to "gamble that any jurisdictional defect, for example, the absence of complete diversity, [would] first escape detection, then disappear prior to judgment." *Id.*

In contrast, Atlas faced no such gamble. *Atlas Global Group, L.P.*, 312 F.3d at 176 (Garza, J., dissenting). Atlas had complete control over whether its two Mexican partners remained in the company. *Id.* "Atlas could — and did — single-handedly remove the parties whose presence spoiled diversity" without judicial oversight. *Id.*

The prospect of jurisdictional manipulation is greatly enhanced under the panel majority's new exception because the judicial supervision discussed in *Caterpillar* is absent when a party unilaterally changes its citizenship. The panel majority's new exception allows a plaintiff to file its complaint, knowing the federal court has no jurisdiction, and then move to a new state (or, in the case of a limited partnership, remove a few partners) to create retroactive diversity. *Id.* "As long as the party acted before the opposing party or the district court noticed (and before a jury verdict or other dispositive decision), it could single-handedly confer jurisdiction on the federal courts" despite the long-standing rules precluding such a maneuver. *Id.*

B. *Newman-Green* Does Not Authorize the Fifth Circuit's New Exception

The panel majority's reliance on *Newman-Green* as support for its new exception is similarly misplaced. *Newman-Green* addressed the narrow question of whether a court of appeals may dismiss a non-diverse dispensable party to cure a jurisdictional defect, or whether the appellate court

must remand the case to the trial court to determine if dismissal is proper. *Newman-Green, Inc.*, 490 U.S. at 832-33. Citing Federal Rule of Civil Procedure 21, this Court held that a court of appeals may dismiss a dispensable non-diverse party to preserve federal jurisdiction. *Id.* at 836-37. This Court emphasized that this authority "should be exercised sparingly." *Id.* at 837.

In contrast to *Newman-Green*, Atlas and Dataflux are obviously indispensable parties. If Atlas had been dismissed, no plaintiff would have existed. Atlas' unilateral change in citizenship cannot properly be equated with a court of appeal's dismissal of a dispensable party. And, again, unlike *Newman-Green*, the crucial element of judicial control and supervision is missing when a litigant's unilateral change in citizenship is at issue.

III. The Fifth Circuit's Decision Creates a Split With the D.C. Circuit

In *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997), the D.C. Circuit expressly refused to expand *Caterpillar* and *Newman-Green* beyond their contexts to allow a party to retroactively create diversity jurisdiction by unilaterally changing its citizenship after suit is filed. *Saadeh*, 107 F.3d at 56-57. The panel majority in this case acknowledged the D.C. Circuit's conflicting holding in *Saadeh* and did not attempt to distinguish it. The panel majority declined to follow *Saadeh*, summarily rejecting the D.C. Circuit's holding as "unpersuasive." *Atlas Global Group, L.P.*, 312 F.3d at 173. Therefore, the Fifth Circuit's decision directly conflicts with the D.C. Circuit's decision in *Saadeh* and creates a circuit split on the issue of whether a party may retroactively create diversity jurisdiction by unilaterally changing its citizenship after suit is filed.

In *Saadeh*, the plaintiff and defendant were not diverse when the plaintiff filed his complaint. 107 F.3d at 53-54. Pointing to *Caterpillar* and *Newman-Green*, the plaintiff argued that the trial court could rely upon the defendant's subsequent change in citizenship to cure any jurisdictional defect. *Id.* at 57. The D.C. Circuit rejected this argument. *Id.* at 56-57 ("[The defendant's] change in citizenship and possible change in domicile could not cure a defect in complete diversity if one existed at the time [the plaintiff] filed his complaint"). The court noted that "[i]t is well established that diversity of citizenship is determined at the time the complaint is filed" and that "[t]he corollary to this rule, that if diversity did not exist when the complaint was filed, it cannot be created by a change of domicile by one of the parties or some other event, appears equally sound and equally well settled." *Id.* at 57 (citations omitted).

The D.C. Circuit expressly declined to expand this Court's ruling in *Caterpillar* to allow the defendant's unilateral change in citizenship to remedy the jurisdictional defect that existed at the time suit was filed. *Id.* ("[T]he plaintiff cites a number of cases involving removal for the proposition that the court may take account of [the defendant's] change in citizenship, but neither these cases nor the Supreme Court's recent decision in *Caterpillar* . . . support [the plaintiff's] view"). The court explained:

> Although we are mindful of the "considerations of finality, efficiency and economy" that concerned the Supreme Court in *Caterpillar*, those concerns in the removal context are insufficient to warrant a departure here from the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed.

Id.

Saadeh cannot be distinguished from this case in any meaningful way, and the panel majority did not attempt to do so. Instead, the panel majority merely stated that *Saadeh* provided no "analytical justification for its conclusion that removal cases deserve different treatment." *Atlas Global Group, L.P.*, 312 F.3d at 173. This criticism is unwarranted because the D.C. Circuit's "analytical justification" is grounded on the longstanding policy considerations governing the strict rules for determining diversity jurisdiction when litigation commences. *Saadeh*, 107 F.3d at 57 ("Were it necessary to track changes of citizenship throughout litigation, courts would face potentially difficult burdens of either holding cases in abeyance for the diversity requirements to be satisfied or, alternatively, repeatedly adjudicating challenges to previous determinations that diversity jurisdiction existed").[2]

2. Unlike the panel majority's decision in this case, the D.C. Circuit's decision in *Saadeh* is consistent with longstanding precedent holding that a party's unilateral change in citizenship after litigation has commenced cannot retroactively create diversity jurisdiction that did not exist at the time suit was filed. *See Goldsmith v. Mayor & City Council of Baltimore*, 845 F.2d 61, 62 n.1 (4th Cir. 1988) (affirming dismissal of claim where party sought to retroactively create diversity jurisdiction based on party's unilateral change in citizenship after suit was filed); *Lyons v. Weltmer*, 174 F.2d 473, 473 (4th Cir. 1949) (per curiam) (same); *Oh v. Ford Motor Co.*, 79 F. Supp. 2d 1375, 1377-78 (N.D. Ga. 1999) (granting motion to remand where diversity jurisdiction was based on defendant's change in citizenship after suit was filed); *Gard v. Teletronics Pacing Sys., Inc.*, 859 F. Supp. 1349, 1354-55 (D. Colo. 1994) (rejecting diversity jurisdiction as alternative basis for subject matter jurisdiction over party's claims based on party's change in citizenship after suit was filed); *Russell v. Harrison*, 562 F. Supp. 467, 471 (N.D. Miss. 1983) (same); *Lang v. Windsor Mount Joy Mut. Ins. Co.*, 487 F. Supp. 1303, (Cont'd)

IV. The Fifth Circuit's Unworkable New Exception to the Longstanding Limits on Diversity Jurisdiction Undermines Fundamental Public Policy Interests and Principles of Federalism

A. The Strict Rules Governing Diversity Jurisdiction Should Not Be Sacrificed in the Name of Judicial Economy

The bright-line rule for determining diversity jurisdiction should be enforced for practical and policy reasons without consideration of subsequent changes in citizenship or domicile. As Judge Garza observed in his dissent in this case, "we cannot fashion jurisdictional rules (or exceptions) solely out of a desire to conserve judicial resources." *Atlas Global Group, L.P.*, 312 F.3d at 177 (Garza, J., dissenting). The bright-line rule is required to provide "maximum stability and certainty to the viability of the action" and to prevent jurisdiction from continually being decided and re-decided throughout the life of a case. *Saadeh*, 107 F.3d at 57 (quoting

(Cont'd)

1306-07 (E.D. Pa. 1980) (granting motion to dismiss where diversity jurisdiction was based on plaintiff's change in citizenship after suit was filed); *Hagen v. Payne*, 222 F. Supp. 548, 553 (W.D. Ark. 1963) (granting motion to remand where diversity jurisdiction was based on defendant's change in citizenship after suit was filed); *see also Field v. Volkswagenwerk AG*, 626 F.2d 293, 304 (3d Cir. 1980) ("Thus, if diversity of citizenship did not exist at the time the action was filed, it cannot be created retroactively by a subsequent change of domicile by one of the parties"); *Slaughter v. Toye Bros. Yellow Cab Co.*, 359 F.2d 954, 956 (5th Cir. 1966) ("It seems to be without question that a change of citizenship occurring after the commencement of the action would not affect jurisdiction or the absence of it") (citation omitted).

and citing 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3608 at 452 (1984)); *see also Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264 (5th Cir. 1995). Otherwise, jurisdiction would be subject to change every time any party altered its citizenship, a problem that is particularly acute in cases involving numerous parties.

The Fifth Circuit's new exception raises additional concerns. As a practical matter, it is unclear how a party opposed to federal jurisdiction would monitor the other side's citizenship during the course of litigation to ensure not only that diversity jurisdiction continues to exist after suit is filed, but also that it timely challenges the court's jurisdiction if diversity disappears.[3]

Furthermore, relaxing longstanding limits on diversity jurisdiction does not promote judicial economy. The efficiency concerns raised by the court of appeals are overstated given the circumstances of this case. The parties participated in a six-day trial. Even with a retrial, the most expensive element of trial preparation — discovery — can be used again without reinventing the wheel. *Compare Parker & Parsley Petr. Co. v. Lancaster*, 972 F.2d 580, 587-88 (5th Cir. 1992) (fact that discovery would not have to be repeated weighed in favor of dismissal even after case had been tried to verdict in federal court); *see also Waste Sys. v. Clean Land Air Water Corp.*, 683 F.2d 927, 931 (5th Cir. 1982). Any concerns regarding the efficiency of determining that jurisdiction is lacking after a trial has been conducted cannot outweigh the larger policy considerations undergirding the bright-line rule.

3. While one may argue that the party who invoked federal jurisdiction should inform the court and the parties if the party's citizenship has changed, it is certainly possible that the party may fail to do so based on a good-faith belief that the change in citizenship does not affect diversity jurisdiction.

B. The Fifth Circuit's Decision Will Undermine Judicial Economy

The ostensible basis for the panel majority's decision in this case is that the exception it crafted is necessary to promote judicial economy. Closer review of the panel majority's holding, however, reveals that the exception will undermine rather than promote judicial economy and that the panel majority's ill-defined attempt to limit the scope of the exception provides little protection from either future jurisdictional litigation or waste.

As a threshold matter, no logical or practical reason justifies limiting the new exception only to circumstances in which the threshold jurisdictional defect is identified after "a jury verdict has been rendered, or a dispositive ruling has been made by the court." *Atlas Global Group, L.P.*, 312 F.3d at 174. The panel majority offers no principled basis for this arbitrary cutoff date. Why should a jurisdictional defect be overlooked if the defect is identified one day ***after*** the jury returns a verdict, but not overlooked if the defect is identified ***while*** the jury deliberates? It will not take long before the panel majority's new exception creates new hair-splitting exercises of this nature as it percolates through the case law.

Consider too the difficulty of determining exactly what constitutes a "dispositive ruling" for purposes of the panel majority's new exception. The "dispositive ruling" criterion is likely to create inconsistent and illogical results. Under the literal terms of the panel majority's exception, a court of appeals could not dismiss a case in which the parties initially lacked diversity if this defect is not identified until an appeal following a "dispositive ruling" under Federal Rule of Civil Procedure 12(b)(6) even though the consumption of judicial

resources presumably would be relatively modest up to that point for a case adjudicated on the pleadings. Yet, a trial court would be allowed to dismiss a case under the new exception if the jurisdictional defect is identified one day before jury deliberations begin after a long trial preceded by years of extensive discovery — a scenario that would involve a far greater consumption of judicial (and litigant) resources.

In short, the underlying efficiency justification offered for the Fifth Circuit's new exception is severely compromised by the very limits the panel majority placed on that rule. As Judge Garza stated, "there is no difference in efficiency terms between the jury verdict and, for example, the moment at which the jury retires." *Id.* at 177 (Garza, J., dissenting). "Nor, for that matter, is there a large difference between the verdict and mid-way through the trial. . . . Indeed, in complicated cases requiring years of discovery, the parties and the court often expend tremendous resources long before the case goes to trial." *Id.* What is clear is that "[t]here exists no principled way to limit a holding based solely on 'considerations of finality, efficiency and economy.'" *Id.*

It is questionable to assume that creating new exceptions to threshold jurisdictional rules will conserve judicial resources. *Id.* Carving out an exception in one case merely encourages future litigants to test the limits to that exception or to create new exceptions. *Id.* If courts are willing to create exceptions to the jurisdictional rules, "parties will cease to believe that any limitations exist." *Id.* at 178. "Parties will begin filing cases in federal court that would be more appropriately handled by the state judicial system." *Id.* "The Supreme Court in *Caterpillar* did not intend such a result." *Id.*

C. The Fifth Circuit's Decision Violates Principles of Federalism

As Judge Garza noted in his dissent, even if some degree of wasted effort occasionally may result from strict adherence to the bright-line rules governing diversity jurisdiction, that is a price that must be paid if the boundaries of federal jurisdiction are to be policed effectively in the service of federalism. *Id.* (citing *Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996) and *Herrick Co. v. SCS Commun., Inc.*, 251 F.3d 315, 330-31 (2d Cir. 2001)).

This Court has long emphasized that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen*, 511 U.S. at 377; *see also Ins. Co. of Ireland, Ltd.*, 456 U.S. at 701 (same). Federal courts "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree," and "[i]t is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen*, 511 U.S. at 377 (citations omitted). A narrow construction of the federal courts' jurisdiction protects fundamental principles of federalism. As this Court stated in *Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574 (1999):

> Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design.

Id. at 586; *see also id.* at 583 ("Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter

delineations must be policed by the courts on their own initiative even at the highest level") (citations omitted); *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 702 ("Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign").

Federal courts should not be encouraged to devise new and ingenious methods of asserting jurisdiction over disputes that belong in state court. This argument holds particularly true in diversity cases such as the present case, where the sole basis for the federal court's jurisdiction is the fortuitous citizenship of the parties and where the substantive issues raised in the case will be decided by the application of state rather than federal law.

The Fifth Circuit's decision grants federal courts new authority to adjudicate cases that should have been filed in state court by allowing a litigant to unilaterally create retroactive diversity jurisdiction. This bold and problematic expansion of diversity jurisdiction warrants intervention and correction by the Supreme Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted. The judgment of the court of appeals should be reversed, and judgment should be rendered dismissing this case for lack of subject matter jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED NOVEMBER 22, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-20245

ATLAS GLOBAL GROUP, L.P.,

Plaintiff-Counter Defendant-Appellant,

and

OSCAR ROBLES-CANON,
officer with Atlas Global Group,

FRANCISCO LLAMOSA,
officer with Atlas Global Group,

Counter Defendants-Appellants,

versus

GRUPO DATAFLUX,

Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Appendix A

Before EMILIO M. GARZA, BENAVIDES, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Atlas Global Group, L.P. ("Atlas") appeals from the district court's grant of Grupo Dataflux's ("Dataflux") motion to dismiss for lack of subject matter jurisdiction. For the reasons stated herein, we REVERSE and REMAND for the entry of judgment in favor of Atlas.

FACTUAL AND PROCEDURAL HISTORY

Atlas is a limited partnership created under Texas law. Dataflux is a Mexican corporation. On November 18, 1997, Atlas brought suit in the Southern District of Texas against Dataflux alleging breach of contract and quantum meruit. Jurisdiction was predicated solely upon the grounds of diversity pursuant to 28 U.S.C. § 1332(a) (1993). At the time the complaint was filed, Atlas's partnership was comprised of five members: (1) Bahia Management, L.L.C., a Texas limited liability company; (2) Capital Financial Partner, Inc., a Delaware corporation; (3) HIL Financial Holdings, L.P., a Texas limited partnership; (4) Francisco Llamosa, a Mexican citizen; and (5) Oscar Robles-Canon, a Mexican citizen. Shortly before trial, however, Atlas completed a business transaction which removed the two Mexican citizens as partners. After a six-day jury trial, the jury awarded $750,000 in damages to Atlas, finding that Dataflux breached its contract with Atlas. Subsequently, Dataflux moved to dismiss, arguing that the district court lacked subject matter jurisdiction because at the time the complaint was filed, two

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of Atlas's partners, like Dataflux, were Mexican citizens. The motion was granted. Atlas filed a motion to alter or amend the judgment, which was denied. Atlas appealed.

STANDARD OF REVIEW

We review dismissals for lack of subject matter jurisdiction *de novo*. *Whatley v. Resolution Trust Corp.*, 32 F.3d 905, 907 (5th Cir. 1994).

DISCUSSION

The parties do not challenge the rule that, for purposes of determining diversity jurisdiction, a partnership is a citizen of each jurisdiction in which its individual partners are citizens. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990) ("We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members.' "). Likewise, the parties do not dispute that there was complete diversity when the trial of this matter commenced. Instead, Dataflux asserts that because the parties were not diverse at the time the complaint was filed, the case was properly dismissed for lack of subject matter jurisdiction. Atlas counters that this initial lack of diversity is not determinative. It maintains that the lack of diversity was remedied prior to trial and, therefore, the district court had jurisdiction.

"The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). However, the Supreme Court has recognized that, as

with most general principles, there are exceptions. *Id.* In *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), and *Newman-Green*, the Supreme Court carved out two such exceptions. Both of these cases are heavily relied upon by Atlas.

A. *Newman-Green*

In *Newman-Green*, the question presented was whether the court of appeals had the authority, pursuant to Federal Rule of Civil Procedure 21, to dismiss a dispensable non-diverse party whose presence spoiled statutory diversity jurisdiction. 490 U.S. at 827. Newman-Green, an Illinois corporation, brought a contract action in federal court against a Venezuelan corporation, four Venezuelan citizens, and William L. Bettison, a United States citizen domiciled in Venezuela. *Id.* at 828. The district court granted partial summary judgment against Newman-Green and an appeal followed. *Id.* On appeal, the Seventh Circuit *sua sponte* raised the issue of statutory jurisdiction, i.e., that jurisdiction did not exist under 28 U.S.C. § 1332(a)(2) or (3) because Bettison was a citizen of the United States, but not of any state, and therefore the suit was not either solely against aliens or against aliens and diverse citizens. *Id.* The panel concluded, however, that Bettison was a dispensable party, and could be dismissed to perfect statutory jurisdiction. *Id.* at 829. The Supreme Court agreed. While recognizing the rule that "[t]he existence of federal jurisdiction ordinarily depends on facts as they exist when the complaint is filed," the Court held that, "[l]ike most general principles . . . this one is susceptible to exceptions." *Id.* at 830. The court concluded that a circuit

court's power to dismiss a party pursuant to Rule 21 was one such exception. *Id.* at 837.

Although *Newman-Green* is distinguishable because Rule 21 is not at issue in the case before us, we find its underlying policy theme instructive. The Court in *Newman-Green* stressed that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Id.* at 836. It is this rationale that persuaded the Court in *Newman-Green* and again in *Caterpillar.*

B. *Caterpillar*

In *Caterpillar*, James David Lewis commenced a civil action in state court against Caterpillar and Whayne Supply. 519 U.S. at 64-65. Lewis and Whayne Supply were both citizens of Kentucky. *Id.* Subsequently, Liberty Mutual intervened as a plaintiff, asserting subrogation claims against both Caterpillar and Whayne Supply. *Id.* at 65. After Lewis settled with Whayne Supply, Caterpillar removed the action, asserting diversity jurisdiction. *Id.* Lewis moved for remand, contending correctly that there was not complete diversity because Liberty Mutual's claims against Whayne Supply kept it in the suit. *Id.* at 65-66. The district court erroneously denied the motion. Prior to trial, Liberty Mutual settled with Whayne Supply. *Id.* at 66. The action proceeded to trial, resulting in a judgment for Caterpillar. *Id.* at 66-67. The Sixth Circuit reversed, concluding that the error of the court in failing to remand made it necessary to vacate the district court judgment. *Id.* at 67.

The Supreme Court reversed the Sixth Circuit, effectively reinstating the jury verdict. *Id.* at 78. The Court held that a "district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdiction requirements are met at the time judgment is entered." *Id.* at 64; *see also Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 & n.5 (5th Cir. 2001) (citing *Caterpillar* for this proposition); *H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 328 (5th Cir. 2000) (same). Addressing the jurisdictional problem specifically, the Court provided that any "*jurisdictional* defect was cured, *i.e.*, complete diversity was established before the trial commenced. Therefore the Sixth Circuit erred in resting its decision on the absence of subject-matter jurisdiction." *Caterpillar*, 519 U.S. at 73; *accord Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 700 (1972) (holding that an erroneous removal need not cause destruction of final judgment if requirements of subject matter jurisdiction are satisfied when judgment is entered).

The Supreme Court then addressed the still-existing statutory problem—the fact that when the action was removed, it was not removable pursuant to 28 U.S.C. § 1441(a) (1994). The question remaining was whether this error, which lurked "in the unerasable history of the case," required reversal of the district court. *Caterpillar*, 519 U.S. at 73. The Court concluded that although arguments could be made for reversal on this ground, these arguments failed because they "run up against an overriding consideration. Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 . . . (1938),

considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75, 77 ("To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice."); *see also Knop v. McMahan*, 872 F.2d 1132, 1139 n.16 (3d Cir. 1989) ("To permit a case in which there is complete diversity throughout trial to proceed to judgment and then cancel the effect of that judgment and relegate the parties to a new trial in a state court because of a brief lack of complete diversity at the beginning of the case would be a waste of judicial resources. It would also encourage litigants to speculate on the jurisdiction issue by saving it for use in the event of a loss.").

While considerations of finality and judicial economy come into play "[o]nce a diversity case has been tried in federal court," the Court's holding in *Caterpillar* references the fact that judgment had already been entered. 519 U.S. at 64, 75. Although Dataflux moved for dismissal before the trial court entered judgment, the analysis in *Caterpillar* compels a conclusion that its exception covers the facts of this case. *Caterpillar* does not hold that there must always be entry of judgment for an exception to the rule to apply. It merely holds that judgment is sufficient. *See In re AT&T Fiber Optic Cable Installation Litig.*, No. IP 99-9313-C H/K, 2001 WL 1397295, at *5-7 (S.D. Ind. Nov. 5, 2001) (concluding that *Caterpillar* does not make judgment a prerequisite and stating that "the reasoning of [*Caterpillar*] extends to district courts even before the formal entry of final judgment. Suppose, for example, that [the] plaintiff [in *Caterpillar*] first

raised the issue after an adverse verdict at trial, but before the judge had actually entered final judgment. Surely the result would be the same—no remand"). Here, the only thing left for the district court to do was enter judgment. It is difficult to distinguish a case where judgment has been entered from a case where nothing is left for the court to do other than enter judgment.

Dataflux's attempts to distinguish *Caterpillar* are not persuasive. First, Dataflux asserts that unlike in *Caterpillar*, jurisdiction was not cured through a dismissal of a party—it was cured through a unilateral change in citizenship effectuated through a reorganization. Second, it contends that this case was not removed but instead was originally filed in federal court. Finally, it asserts that *Newman-Green* is distinguishable because it dealt with Rule 21.

1. Method of Perfecting Jurisdiction

As to the first ground, Dataflux argues that *Caterpillar* does not apply in a case where a party has not been dismissed, but instead statutory diversity jurisdiction is perfected by a "unilateral change" in citizenship. While a party was dismissed in *Caterpillar*, and this is perhaps technically a distinguishing factor, this factor was not at the heart of the Supreme Court's analysis in *Caterpillar* and Dataflux does not persuasively explain its import. Dataflux opines that extending the exception to cases where jurisdiction was perfected through a unilateral change of domicile would defeat the purpose of the general rule. According to Dataflux, such a rule would require the district court to reevaluate the existence of diversity jurisdiction in each instance in which

a party changed its domicile. We recognize that the rule that diversity jurisdiction is determined solely at the outset of the litigation exists precisely to prevent the district court from having to make such determinations. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3608 (2d ed. 1984). However, our holding today has only a slightly greater effect on the general rule than would the strictest construction of *Caterpillar*. As in the *Caterpillar* case, a district judge would only have to reevaluate jurisdiction when it is challenged after a verdict or dispositive ruling. If a party re-organized before this point and jurisdiction were challenged, the general rule would be applied and the re-organization would be of no effect.

2. Removed Cases vs. Original Federal Forum Cases

Dataflux also focuses on the fact that *Caterpillar* dealt with a removed case and that this action was originally filed in federal court. The only authority cited by Dataflux in support of its position that the fact that *Caterpillar* involved a removal action is a controlling distinguishing factor is *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). In *Saadeh*, the D.C. Circuit distinguished its case from *Caterpillar* on the remand ground, concluding that "[a]lthough we are mindful of the 'considerations of finality, efficiency and economy' that concerned the Supreme Court in *Caterpillar*, those concerns in the removal context are insufficient to warrant a departure here from the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed." *Id.* at 57. Because *Saadeh* does not provide any analytical justification for its conclusion that removal cases deserve differential treatment, we find it unpersuasive.

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Dataflux opines that removal cases are different because removal is subject to judicial control, which decreases the likelihood of jurisdictional manipulation. However, district courts always have a duty to examine jurisdiction regardless of whether a case is removed or was originally filed in the district court. *Save The Bay, Inc. v. U.S. Army*, 639 F.2d 1100, 1102 (5th Cir. 1981) ("[I]t is incumbent upon federal courts[,] trial and appellate[,] to constantly examine the basis of jurisdiction, doing so on our own motion if necessary."). Furthermore, we find it difficult to imagine that plaintiffs who cannot establish federal jurisdiction will intentionally file an action in federal court in the hope that neither the judge nor the defendant raises the issue, knowing that at any point before a verdict or dispositive ruling, the court or defendants could raise the issue and the case would be dismissed.

We conclude that the exception carved out in *Caterpillar* applies under the circumstances of this case. The decision in *Caterpillar* was not limited to removal cases. Undoubtedly, if the Supreme Court had found this to be a dispositive factor, it would have spoken to the issue. The same is true of Dataflux's argument that *Newman-Green*'s rationale is limited to dismissals pursuant to Rule 21. While it is accurate to describe these cases as removal and Rule 21 cases, respectively, there is nothing that persuades us that the principle of these cases is limited to only the exact same procedural scenarios. *See C.L. Ritter Lumber Co., Inc. v. Consolidation Coal Co.*, 283 F.3d 226, 229-230 (4th Cir. 2002) (holding that the district court could, post-trial, split a suit into two separate cases to cure a jurisdictional defect and stating that "[t]he specific nature of the remedy implicates the discretion of the court, not its power to act").

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In the instant case, this dispute has been completely adjudicated by a federal district court, which had jurisdiction over the parties throughout the trial and at the time the jury rendered its verdict of $750,000 in favor of Atlas. The parties and the court have committed ample resources to its adjudication. They have had the benefit of a full assessment of the evidence by an impartial jury during a six-day trial. To erase the result of that process by requiring them to re-litigate their claims in state court, or likely in federal court, is not necessary under *Caterpillar*. In so concluding, we remain aware of the limited nature of the district court's jurisdiction and the Supreme Court's caveat against improper expansion of federal jurisdiction. However, this narrow exception applies only where (1) an action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met, (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling has been made by the court, and (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured. If at any point prior to the verdict or ruling, the issue is raised, the court must apply the general rule and dismiss regardless of subsequent changes in citizenship.

CONCLUSION

For the reasons stated herein, we REVERSE and REMAND with instructions to the district court to enter judgment in favor of Atlas.

REVERSED and REMANDED.

EMILIO M. GARZA, Circuit Judge, dissenting:

This case should be easy. Imagine that a plaintiff from State X filed suit in federal court against a defendant from State X. The plaintiff incorrectly contended in the complaint that the federal court had diversity jurisdiction. Nearly three years passed. Then the plaintiff moved to State Y, creating diversity. Imagine that, after the jury rendered a verdict for the plaintiff, the district court discovered that, at the time the complaint was filed, the parties were not completely diverse—indeed, there was *no* diversity between the parties. The district court would recognize the longstanding rule that diversity jurisdiction is determined at the time the complaint is filed. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). The plaintiff's recent move would make no difference. The district court would dismiss the case for lack of jurisdiction. *See Sarmiento v. Texas Bd. of Veterinary Med. Examiners By and Through Avery*, 939 F.2d 1242, 1246 n.6 (5th Cir. 1991) ("Although Sarmiento is currently domiciled in Florida, at the time he filed suit he was domiciled in Texas, as he also was when his third amended complaint was filed. Therefore, and neither party contests this, the jurisdiction of the district court could not be based on diversity of citizenship pursuant to 28 U.S.C. § 1332.").

The dispute between Atlas Global and Dataflux is precisely the above scenario. Atlas Global is a limited partnership, whose citizenship is determined by the citizenship of all its partners. *Carden v. Arkoma Associates*, 494 U.S. 185, 195-96 (1990). At the time Atlas Global filed its complaint, two of its partners were Mexican citizens. Thus, Atlas was a "citizen" of Mexico. Dataflux was a Mexican

corporation. Therefore, the parties were not completely diverse. Indeed, there was *no* diversity between the parties. Nearly three years after filing its complaint, Atlas conducted a business transaction that removed its two Mexican partners, and effectively "moved out of" Mexico. The case went to trial; the jury returned a verdict for Atlas. Then, once the district court discovered the jurisdictional flaw, it dismissed the case.

The majority opinion, however, complicates this simple scenario by creating a new exception to the rule that diversity jurisdiction depends on the citizenship of the parties at the time the complaint is filed. The majority opinion crafts the following "narrow exception": A case will not be dismissed for lack of subject matter jurisdiction where "(1) an action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met, (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling has been made by the court, and (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured." The majority's exception threatens to swallow the rule.

The majority opinion asserts that this new rule is only a "slight" extension of the Supreme Court's decision in *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996). The facts of *Caterpillar* make clear, however, that it has no applicability to a case where a party unilaterally creates diversity jurisdiction.

In *Caterpillar*, Lewis, a citizen of Kentucky, filed state law tort claims in Kentucky state court against Caterpillar

(a Delaware corporation with its principle place of business in Illinois) and Whayne Supply, a Kentucky corporation. 519 U.S. at 64-65. Liberty Mutual, Lewis' insurance carrier, intervened in the lawsuit, asserting claims against both Caterpillar and Whayne Supply. *Id.* at 65. Lewis later settled his claims with Whayne Supply. *Id.* Caterpillar then tried to remove the case to federal court, asserting diversity jurisdiction. *Id.* Lewis requested remand, claiming that the district court lacked jurisdiction. *Id.* Lewis correctly pointed out that Liberty Mutual's claim against Whayne Supply kept it in the lawsuit, and, as a result, the parties were not completely diverse. *Id.* at 65-66. The district court erroneously denied his motion to remand. *Id.* at 66. Three years later, and several months prior to trial, Liberty Mutual settled its claims with Whayne Supply, and the district court dismissed Whayne Supply from the lawsuit. *Id.* The Supreme Court held that, because the "jurisdictional defect" (the presence of Whayne Supply) was cured prior to judgment, it was unnecessary to dismiss the case. *Id.* at 76-78.

The majority opinion acknowledges that, in *Caterpillar*, there was no "unilateral change" in citizenship, yet asserts that "this factor was not at the heart of the Supreme Court's analysis in *Caterpillar*[.]" The majority opinion apparently overlooks the Supreme Court's response to Lewis' prediction that creating an exception in his case would "encourag[e] state court defendants to remove cases improperly[.]" *Caterpillar*, 519 U.S. at 77 (internal quotation marks omitted). The Supreme Court rejected this possibility, because it "assume[d] [a party's] readiness to gamble that any jurisdictional defect, for example, the absence of complete diversity, [would] first escape detection, then disappear prior to judgment." *Id.* Under the facts of *Caterpillar*, the party that brought the case to federal court

(Caterpillar) would have had to gamble. Caterpillar had to hope that neither the district court nor any appellate court would detect the jurisdictional defect.[1] More significantly for present purposes, Caterpillar had to gamble that Whayne Supply (the party whose presence destroyed diversity) would somehow disappear from the lawsuit. Caterpillar had no control over whether Whayne Supply remained in the case. It just had to sit back and keep its fingers crossed.

Atlas, by contrast, faced no such "gamble." As the facts of this case illustrate, Atlas had complete control over whether its two Mexican citizens remained in the company as partners. Atlas could—and did—single-handedly remove the parties whose presence spoiled diversity. It is irrelevant that, in this case, Atlas may have filed its complaint in good faith, genuinely failing to recognize the jurisdictional defect. Under the rule crafted by the majority, a less scrupulous party could deliberately file suit in federal court when diversity was lacking. Such a plaintiff might choose to file quickly because, for example, the statute of limitations on its claim was about to run out. The majority's rule would allow that plaintiff to file its complaint in federal court, knowing that the federal courts did not have jurisdiction, and then move to a new state (or, in the case of a limited partnership, remove a few partners) and create diversity.[2]

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1. In *Caterpillar*, it was particularly unlikely that the courts would remain unaware of the jurisdictional flaw, since Lewis had pointed it out in his motion to remand.

2. The majority's holding is utterly out of step with the long-standing principle that the party who files a case in federal court is responsible for establishing jurisdiction. *See Howery*,

(Cont'd)

As long as the party acted before the opposing party or the district court noticed (and before a jury verdict or other dispositive decision), it could single-handedly confer jurisdiction on the federal courts.[3]

The majority opinion creates a new exception to the long-standing rule that diversity jurisdiction is determined at the time the complaint is filed, apparently out of a concern about judicial economy. The majority stresses that "'[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law . . . considerations of finality, efficiency and economy become overwhelming.'" There is no question that the conservation of judicial resources is an important value. *Caterpillar*, 519 U.S. at 76 ("'[R]equiring dismissal after years of litigation . . . would impose

(Cont'd)

243 F.3d at 916 ("[T]he burden of establishing federal jurisdiction rests on the party seeking the federal forum."); *Texas Beef Group v. Winfrey*, 201 F.3d 680, 686 (5th Cir. 2000) (same); *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991) (same). This rule exists because the federal courts are courts of limited jurisdiction. Accordingly, "[w]e must presume that a suit lies outside this limited jurisdiction," until the party seeking the federal forum has proven that his suit belongs in federal court. *Howery*, 243 F.3d at 916.

3. We have repeatedly declared that parties may not by agreement confer subject matter jurisdiction on the federal judiciary. *Howery v. Allstate Ins. Co.*, 243 F.3d at 912, 919 (5th Cir. 2001) ("[S]ubject-matter jurisdiction cannot be created by waiver or consent."); *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) ("The parties can never consent to federal subject matter jurisdiction[.]"). Yet the majority has fashioned a rule that allows *a single party* to confer jurisdiction on the federal courts.

unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.'") (quoting *Newman-Green*, 490 U.S. at 836).

The problem with the majority's holding is that efficiency appears to be its *only* concern. If that is the case, then the majority's exception cannot be confined to the "narrow" boundaries it has prescribed. After all, parties "commit[] ample resources" to a case long before a jury verdict or a dispositive ruling from the court. The majority opinion states that, under its rule, if one of the parties or the district court discovers a jurisdictional defect prior to the jury verdict, the court should dismiss the case. Yet there is no difference in efficiency terms between the jury verdict and, for example, the moment at which the jury retires. Nor, for that matter, is there a large difference between the verdict and mid-way through the trial. (The trial in this case lasted six days.)[4]

4. The only difference is that after a verdict or dispositive ruling, the parties know the result. Atlas focuses on this fact, suggesting that this Court should not allow the "loser" in the case to have it dismissed on jurisdictional grounds. *See* Brief of Appellants at x (characterizing the issue in this case as whether the magistrate erred "in dismissing the case after a jury trial when the *loser* . . . moved to dismiss for lack of jurisdiction") (emphasis added). The majority, correctly enough, does not focus on this factor, apparently recognizing that parties cannot waive the right to challenge the subject matter jurisdiction of the federal courts. Parties may raise that jurisdictional defense at any point, even after judgment is entered. *Coury*, 85 F.3d at 248 ("[L]ack of [federal subject matter] jurisdiction is a defense which cannot be waived."). Indeed, the only party that has an incentive to correct a jurisdictional defect (including one that still exists at judgment) is the party that lost the case. In order for our courts to remain courts of limited jurisdiction, we must, in some cases, rely on the "loser" to catch a jurisdictional defect that should have been caught much sooner.

Indeed, in complicated cases requiring a great deal of discovery, the parties and the court often expend tremendous resources long before the case goes to trial. There is no principled way to limit a holding based solely on "considerations of finality, efficiency and economy."

Nor is it clear that creating exceptions to our jurisdictional rules would even lead to the conservation of judicial resources. Instead, carving out an exception in one case merely encourages future parties to file more appeals, urging this Court to create more exceptions. *See Saadeh v. Farouki*, 107 F.3d 52, 57 (D.C. Cir. 1997) (refusing to create an exception to "the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed," and noting that "the instant case demonstrates the value of a bright-line rule; even on appeal the parties continue to develop new theories and proffer new evidence on citizenship and domicile"). We should enforce our procedural rules as strictly as possible, even if that means a waste of judicial resources in a single case. Otherwise, in the long run, we may waste many more judicial resources litigating all the potential exceptions to our previously "clear" jurisdictional rules.[5]

However, regardless how these concerns about judicial economy play out, we cannot fashion jurisdictional rules

5. Indeed, we might even waste the time of the parties in an individual case, if the Supreme Court ultimately rejected the exception we carved out. *See E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 930 (2d Cir. 1998) ("Nobody's interest would be served if we by stretching the law found jurisdiction to exist, only to have that position ultimately rejected by the High Court.").

(or exceptions) solely out of a desire to conserve judicial resources. For we must always keep in mind this central principle: "It is axiomatic that the federal courts have limited subject matter jurisdiction and cannot entertain cases unless authorized by the Constitution and legislation." *Coury*, 85 F.3d at 248. "Obviously, [this] principle[ ] can result in a tremendous waste of judicial and private resources." *Id.* at 249. But the so-called "waste" of judicial resources that occurs when we dismiss a case for lack of jurisdiction is the price that we pay for federalism. *Id.*; *see also Herrick Co., Inc. v. SCS Communications, Inc.*, 251 F.3d 315, 330-31 (2nd Cir. 2001) ("As the Supreme Court has remarked, '[o]nce a diversity case has been tried in federal court with rules of decision supplied by state law . . . considerations of finality, efficiency, and economy become overwhelming.' . . . At the same time, however, the problems of defective jurisdiction . . . are themselves weighty, being tied to the fundamental constitutional idea that federal courts have only limited jurisdiction[.]") (quoting *Caterpillar*, 519 U.S. at 75). If we make too many exceptions to our jurisdictional rules, parties will cease to believe that any limitations exist. Parties will begin filing cases in federal court that would be more appropriately handled by the state judicial system. The Supreme Court in *Caterpillar* did not intend such a result.

I respectfully dissent.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AND ENTERED DECEMBER 6, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

V.

GRUPO DATAFLUX,

Defendant.

MEMORANDUM AND ORDER

Before the Court as a post-trial motion is Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Document No. 123). In that motion, Defendant argues for the first time that this Court does not have diversity jurisdiction over this case because Defendant is a citizen of Mexico as are two of Plaintiff's limited partners. Given that the citizenship of Plaintiff Atlas Global Group, L.P. must be considered in determining diversity jurisdiction, Defendant maintains that this case must be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction. Plaintiff opposes the motion to dismiss, but does not contest the governing legal proposition that a limited partnership's citizenship is determined by the citizenship of its partners.

Appendix B

Jurisdiction in this case has always been predicated on diversity, 28 U.S.C. § 1332. In determining diversity jurisdiction, the citizenship of the limited and general partners of a limited partnership are to be considered. *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). In addition, jurisdiction is to be determined as of the date the case was filed. *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 776 (5th Cir. 1986) ("The citizenship of a party at the commencement of the action is controlling for purposes of determining diversity jurisdiction and subsequent actions do not affect the court's jurisdiction. . . . Jurisdiction cannot be created retroactively by substituting a diverse claimant for a nondiverse party.")

Here, as of the date this case was filed, Defendant Grupo Dataflux was Mexican corporation. Plaintiff Atlas Global Group, L.P., a Texas limited partnership, was comprised of Bahia Management L.L.C., a Texas limited liability company, Capital Financial Partner, Inc., a Delaware corporation, HIL Financial Holdings, L.P., a Texas limited partnership, Francisco Llamosa, a Mexican citizen, and Oscar Robles, a Mexican citizen. Given that two of Plaintiff Atlas Global Group, L.P.'s limited partners were Mexican citizens at the time this case was filed, there was not complete diversity of parties under 28 U.S.C. § 1332, and the Court lacked diversity jurisdiction over this case. *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1986) ("Diversity does not exist where aliens are on both sides of the litigation."). Accordingly, it is

ORDERED that Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Document No. 123) is GRANTED and this case is DISMISSED WITHOUT PREJUDICE. It is further

Appendix B

ORDERED that the statute of limitations for the claims alleged in this case is STAYED from November 18, 1997, the date this case was filed, until ten days after the entry of this Order, to allow Plaintiff to refile this case in the appropriate forum.

Signed at Houston, Texas, this 6th day of December, 2000.

s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AND ENTERED JANUARY 5, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

V.

GRUPO DATAFLUX,

Defendant.

ORDER

Before the Court is Plaintiff Atlas Global Group, L.P.'s Motion to Alter or Amend Judgment (Document No. 130), in which Plaintiff seeks reconsideration of the post-trial Memorandum and Order dismissing this case for lack of jurisdiction. As set forth in the Memorandum and Order dismissing this action for want of jurisdiction, it is this Court's opinion that at the time this action was filed complete diversity did not exist. If an exception to the well established rule set forth in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) is to be made in this case, it must be made by a higher court than this one. Accordingly, it is

Appendix C

ORDERED that Plaintiff Atlas Global Group, L.P.'s Motion to Alter or Amend Judgment (Document No. 130) is DENIED.

Signed at Houston, Texas, this 5th day of January, 200[1].

s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED AND FILED FEBRUARY 17, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20245

ATLAS GLOBAL GROUP, LP

Plaintiff - Counter Defendant - Appellant

and

OSCAR ROBLES-CANON, officer with Atlas Global Group; FRANCISCO LLAMOSA, officer with Atlas Global Group

Counter Defendants - Appellants

v.

GRUPO DATAFLUX

Defendant - Counter Claimant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING AND
REHEARING EN BANC

Appendix D

(Opinion 11/22/02, 5 Cir., __, __ F.3d __)

Before EMILIO M. GARZA, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Carl E. Stewart
United States Circuit Judge

Emilio M. Garza, Circuit Judge, dissenting, for the same reasons as stated in the opinion.

APPENDIX E — STATUTE INVOLVED

28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Supreme Court, U.S.
FILED
JUL 18 2003
OFFICE OF THE CLERK

No. 02-1689

IN THE

Supreme Court of the United States

GRUPO DATAFLUX,

Petitioner,

v.

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

Dataflux's petition for writ of certiorari should be denied because the majority opinion of the Fifth Circuit ("the Majority Opinion"): (1) applied correctly this Court's precedent; (2) the D.C. Circuit's opinion is not persuasive; and (3) policy concerns support the Majority Opinion.

I. The Majority Opinion Applied Correctly This Court's Precedent.

Dataflux goes to great lengths to characterize the Majority Opinion as a "new rule." The Majority Opinion is however merely a correct application of this Court's holding in *Caterpillar, Inc. v. Lewis* to this case; it is not a "new rule." 519 U.S. 61 (1996). As demonstrated below, this Court did not limit its holding in *Caterpillar*, as Dataflux suggests, to cases involving removal; to cases in which the lack of complete diversity was cured by the dismissal of a nondiverse party; or to cases in which a judgment was rendered before the lack of complete diversity was established. Instead, *Caterpillar* applies to cases such as this one. Namely, cases in which the complaint was filed originally in federal court; the lack of diversity was cured by a party's unilateral conduct; and the jury verdict was returned before the lack of diversity was raised by either party or the judge. Accordingly, for the reasons detailed below, Atlas asks the Court to deny Dataflux's petition.

A. This Court's Opinion in *Caterpillar* Applies to Cases Filed Originally in Federal Court.

1. This Court Did Not Limit Its Holding to Removal Cases.

Dataflux argues that the application of *Caterpillar* should be limited to removal cases. This Court did not however limit its holding in *Caterpillar* to cases that are removed to federal court. *See Caterpillar*, 519 U.S. at 61-78. While it is true that *Caterpillar* did involve a case that was removed, the *Caterpillar* Court's analysis concerning diversity jurisdiction, which is the issue here, did not focus on removal. This is demonstrated by the method in which the *Caterpillar* Court performed its analysis. The *Caterpillar* Court noted first that the underlying case had proceeded to trial, jury verdict, and judgment. *Id.* at 64-67. The *Caterpillar* Court noted further that, on appeal, the Sixth Circuit Court of Appeals had vacated the judgment for lack of subject matter jurisdiction because complete diversity did not exist when the case was removed. *Id.* at 67. Before the *Caterpillar* Court addressed issues regarding removal procedure, the Court analyzed whether the lack of complete diversity, at the time the case was removed, was sufficient to have deprived the district court of subject matter jurisdiction. *Id.* at 73. The *Caterpillar* Court concluded the Sixth Circuit had erred. *Id.* The *Caterpillar* Court held that the trial court did have subject matter jurisdiction because "[t]he jurisdictional defect was cured, i.e., complete diversity was established before the trial commenced." *Id.* at 73. Only after the *Caterpillar* Court concluded that subject matter jurisdiction existed did it address the issue of removal. *See id.* at 473-78. In particular, the *Caterpillar* Court addressed whether the trial court's error in denying the plaintiff's proper motion to remand was a

sufficient "statutory flaw" to warrant sending the case back to the trial court for the entire litigation process to be done over. *See id.* Notably, the Court held that even that error was not sufficient to prevent the trial court from entering judgment. *Id.* at 77.

Throughout the *Caterpillar* Court's opinion, it did not state that it intended the application of its reasoning or holding to be limited to removal cases. *See Caterpillar*, 519 U.S. at 61-78. In that regard, it is telling that Dataflux has cited to no portion of the *Caterpillar* decision that supports its position that this Court intended its opinion to be limited to removal cases. Dataflux seems to confuse this Court's noting of the obvious, that *Caterpillar* was a removal case, with this Court's limiting its opinion to removal cases.

2. Cases Filed Originally in Federal Court Should Not Be Subject to Different Rules Regarding Subject Matter Jurisdiction.

Dataflux argues that a case that is filed originally in federal court should be treated differently than one that is removed to federal court. Dataflux seeks to support this argument with its assertion that the judge and the parties will somehow behave differently in the context of a case removed to federal court than in the context of a case filed originally in federal court. Specifically, that a case will be scrutinized closer in the removal context. However, in both an originally filed case and a removal case, the same opportunities and obligations to remedy a defect in jurisdiction exist. In the context of removal, it ~~is the party~~ removing the case who has the burden to establish diversity. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Estate of Martineau v. Arco Chem. Co.*, 203 F.3d 904, 910 (5th Cir. 2000). In the

context of an original filing, it is the party filing the suit who bears the burden to establish diversity. *See Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991). Regardless of whether a case is removed to, or filed originally in, federal court, the party that seeks to avoid federal jurisdiction has the opportunity to raise the lack of diversity. *See* 28 U.S.C. § 1447(c) (permitting a party to file a motion for remand for lack of subject matter jurisdiction); FED. R. CIV. P. 12(b)(1) (permitting a party to move for dismissal for lack of subject matter jurisdiction). Further, the court can raise the lack of diversity at any time, regardless of whether a case is removed or filed originally in federal court. *See Stafford*, 945 F.2d at 804 (noting that the lack of subject matter jurisdiction can be, and should be, raised by the court). Considering these well settled principles, it seems illogical that a removal case is subject to greater scrutiny, or that courts should apply a different jurisdictional standard to cases filed originally in federal court.

Ultimately then, as demonstrated above, the mere fact that *Caterpillar* was a removal case is a distinction without a difference. Atlas requests therefore that this Court reject Dataflux's suggested interpretation of *Caterpillar*.

B. *Caterpillar* Applies to Cases in Which A Plaintiff Unilaterally Cures The Lack of Complete Diversity.

Dataflux contends that the application of *Caterpillar* should be limited to cases in which the lack of complete diversity is cured through dismissal of the nondiverse party. This Court did not however limit its holding in *Caterpillar* to cases in which the lack of diversity is cured in that manner. *See Caterpillar*, 519 U.S. at 61-78. Although *Caterpillar* did involve a nondiverse party that was eliminated through

dismissal, the Court's analysis concerning diversity jurisdiction, which is the issue here, did not focus on how the nondiverse party was eliminated. Again, as discussed above, this is demonstrated by the method in which the Court performed its analysis. Namely, the *Caterpillar* Court determined that diversity jurisdiction existed because the lack of diversity was cured "before trial commenced." *Id.* at 73. In reaching this conclusion, the *Caterpillar* Court did not rely, in any way, on how the lack of diversity was cured. *See Caterpillar*, 519 U.S. at 61-78. Further, as detailed above, the same opportunities and obligations to remedy a defect in jurisdiction exist before the nondiverse party is eliminated, regardless of whether that party is eliminated through dismissal or a unilateral act of the party seeking to assert jurisdiction. *See* 28 U.S.C. § 1447(c); FED. R. CIV. P. 12(b)(1); *Wilson*, 257 U.S. at 97; *Estate of Martineau*, 203 F.3d at 910; *Stafford*, 945 F.2d at 804. Atlas requests therefore that this Court reject Dataflux's proposed interpretation of *Caterpillar*.

C. *Caterpillar* Applies to Cases in Which The Jury Has Returned A Verdict.

Dataflux argued below that *Caterpillar* does not apply to cases in which a verdict has been returned, but judgment has not been rendered. In an abundance of caution, Atlas will address that argument. This Court did not limit its holding in *Caterpillar* to cases in which judgment was entered. *See Caterpillar*, 519 U.S. at 61-78. In fact, the *Caterpillar* Court stated clearly that the basis for its holding that the trial court had subject matter jurisdiction to enter the judgment was that "[t]he jurisdictional defect was cured, i.e., complete diversity was established *before the trial commenced*." *Id.* at 73 (emphasis added).

It is important to note that if the entry of judgment were required, the same danger of "jurisdictional manipulation" of which Dataflux has expressed concern would exist. For example, an unscrupulous defendant could realize that diversity was not complete when the plaintiff filed its complaint. The defendant could then wait to hear the jury's verdict. If the defendant did not like the verdict, the defendant could merely object before the judge entered the judgment, and thereby unwind the entire case, and receive "a second bite at the apple." Taking Dataflux's argument to the absurd, if a trial court were to apply Dataflux's proposed interpretation of *Caterpillar*, that court would be compelled to dismiss a fully litigated case in the following circumstance: a jury verdict has been returned, the judge is in the process of entering the judgment, and a split second before the judge does so, the defendant objects to the lack of complete diversity at the time the case was filed.[1] It is unlikely this Court intended this result, especially in light of its statement that jurisdiction existed in *Caterpillar* because diversity was cured "before trial commenced." Atlas requests therefore that this Court reject Dataflux's proposed interpretation of *Caterpillar*.

D. The Fifth Circuit's Opinion Stated Clearly That It Viewed *Newman-Green* Only As Instructive.

Dataflux argues that the Fifth Circuit erred in relying on *Newman-Green, Inc. v. Alfonzo-Larrain* because "*Newman-Green* addressed the narrow question of whether a court of appeals may dismiss a non-diverse dispensable party to cure

1. Atlas seeks in no way to suggest that Dataflux or its counsel engaged in such inappropriate behavior. Atlas points out the possibility only to demonstrate that an unscrupulous party or counsel could engage in such behavior.

a jurisdictional defect, or whether the appellate court must remand the case to the district court to determine if dismissal is proper." 490 U.S. 826 (1989). Dataflux is mistaken in its reading of the Majority Opinion. The Fifth Circuit stated clearly that *Newman-Green* is distinguishable from the present case, and that the majority saw *Newman-Green* as only instructive in addressing the current case. In particular, the Majority Opinion reads in relevant part as follows:

> Although *Newman-Green* is distinguishable because Rule 21 is not at issue in the case before us, we find its underlying policy theme instructive. The Court in *Newman-Green* stressed that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." It is this rationale that persuaded the Court in *Newman-Green* and again in *Caterpillar*.

Atlas Global Group, L.P. v. Grupo Dataflux, 312 F.3d 168, 171 (5th Cir. 2002). It bears noting that in *Caterpillar*, this Court likewise noted that while *Newman-Green* was distinguishable from the facts in *Caterpillar*, the policy concerns detailed in *Newman-Green* were "instructive." *See Caterpillar*, 519 U.S. at 75-76.

Dataflux cites no authority to support an assertion that the Fifth Circuit was not entitled to look to *Newman-Green* as instructive. In light of Dataflux's incorrect reading of the Majority Opinion and Dataflux's failure to cite supporting authority, Atlas urges the Court to reject Dataflux's assertion that the Fifth Circuit erred by relying on *Newman-Green*.

II. The *Saadeh* Opinion is Not Persuasive.

Dataflux argues that the Majority Opinion "creates a split with the D.C. Circuit." In particular, Dataflux contends that the Majority Opinion conflicts with the D.C. Circuit's decision in *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). In *Saadeh*, complete diversity did not exist when the plaintiff filed his complaint. *Id.* at 53-54. Before trial, the defendant raised the lack of diversity in a motion to dismiss. *Id.* at 54. The trial court denied the motion. On appeal, the D.C. Circuit considered this Court's holding in *Caterpillar*. The D.C. Circuit refused to apply *Caterpillar*. In doing so, the D.C. Circuit did not, however, provide analysis to support its rejection of *Caterpillar*. Specifically, the *Saadeh* Court stated the following:

> In *Caterpillar*, a removal case involving non-diverse parties, the district court denied a timely motion to remand and entered judgment following a jury trial. The Supreme Court, noting that as the result of a settlement resulting in dismissal of the non-diverse defendant, allowed the judgment to stand on the ground that considerations of finality, efficiency, and economy were paramount. . . . Although we are mindful of the considerations of finality, efficiency and economy that concerned the Supreme Court in *Caterpillar*, those concerns in the removal context are insufficient to warrant a departure here from the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed.

Id. at 57 (citations omitted).

Apparently, the D.C. Circuit is basing its decision on *Caterpillar*'s having been a removal case. However, the *Saadeh* Court does not explain why it believes this Court intended *Caterpillar* to be limited to removal cases. Further, the *Saadeh* Court does not explain why a removal case should receive different treatment. In light of the lack of analysis in *Saadeh*, the opinion does not provide a basis to overcome clear Supreme Court precedent. Atlas urges this Court therefore to reject *Saadeh*.

III. Policy Concerns Support The Majority Opinion.

A. Judicial Economy Weighs In Favor of the Majority Opinion.

Dataflux contends that judicial economy does not support the Majority Opinion. Dataflux argues that if the Majority Opinion is permitted to stand, it will increase consumption of judicial resources over time as litigants "test the limits" of the Majority Opinion. Dataflux is wrong.

The Majority Opinion stated the following about judicial economy:

> In the instant case, this dispute has been completely adjudicated by a federal district court, which had jurisdiction over the parties throughout the trial and at the time the jury rendered its verdict of $750,000 in favor of Atlas. The parties and the court have committed ample resources to its adjudication. They have had the benefit of a full assessment of the evidence by an impartial jury during a six-day trial. To erase the result of that process by requiring them to re-litigate their

> claims in state court, or likely in federal court, is not necessary under *Caterpillar*.

Atlas Global Group, L.P., 312 F.3d at 174.[2]

In reaching its conclusion, the Majority Opinion noted that *Newman-Green* was instructive on the issue of judicial economy. The Majority Opinion pointed specifically to the portion of *Newman-Green* that "stressed that 'requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.'" *Atlas Global Group, L.P.*, 312 F.3d at 171 (quoting *Newman-Green*, 490 U.S. at 836). The Majority Opinion relied also on the following statements by the *Caterpillar* Court about judicial economy: "Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Atlas Global Group, L.P.*, 312 F.3d at 172 (quoting *Caterpillar*, 519 U.S. at 75, 77).

Despite the Majority Opinion's clear reliance on Supreme Court statements regarding judicial economy, Dataflux seeks to challenge these principals. Specifically, Dataflux asserts that judicial economy should not be a consideration because future litigants may seek to "test the limits" of the Majority Opinion. Dataflux appears to argue therefore that courts

2. In addition to the jury verdict against Dataflux, the jury also found against Dataflux on its third-party claims against two individual plaintiffs. Under Dataflux's interpretation of *Caterpillar*, the verdict on the third-party claims would likewise be erased, thereby requiring the parties to retry those issues. Clearly, this would also cut against the policy of judicial economy.

should not seek to apply exceptions to general rules because future litigants may seek to broaden the application of the exceptions. Dataflux does not however cite any authority for such a proposition. Considering the lack of authority for such a proposition, and the general absurdity of the idea that a court should refrain from applying an exception because future litigants may ask the court to extend the application, Atlas urges the Court reject Dataflux's argument and to conclude instead that judicial economy weighs in favor of the Majority Opinion.

B. The Majority Opinion Prevents Inconsistent Fact Findings.

In addition to issues of judicial economy, the policy concern of preventing inconsistent factfindings also weighs in favor of the Majority Opinion. In particular, if the law were not as set out in *Caterpillar*, the danger of inconsistent findings would be created. Namely, as in this case, a party could receive a jury verdict, have its case dismissed, go through the entire litigation process again, and have a jury reach a different verdict. The Majority Opinion, as written, prevents such an inconsistent result. Atlas asks the Court to maintain that protection by denying Dataflux's petition.

CONCLUSION

For the reasons stated above it is evident that the Majority Opinion is correct, and supported by clear Supreme Court precedent. Atlas requests therefore that the Court deny Dataflux's petition.

Respectfully submitted,

ROGER B. GREENBERG
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Supreme Court, U.S.
FILED
JUL 24 2003
OFFICE OF THE CLERK

No. 02-1689

IN THE

Supreme Court of the United States

GRUPO DATAFLUX,

Petitioner,

v.

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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Saadeh v. Farouki, 107 F.3d 52 (D.C. Cir. 1997)	1, 2

REASONS FOR GRANTING THE PETITION

I. The Respondents Confirm That a Circuit Split Exists

The Respondents confirm that a clear circuit split exists between the Fifth Circuit's decision in this case and the D.C. Circuit's decision in *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). The Respondents contend that *Saadeh* is not persuasive and urge this Court "to reject *Saadeh*." Brief in Opposition, pp. 8-9. That, however, is an argument in favor of granting Dataflux's petition for writ of certiorari so that this Court can analyze the merits of the conflicting holdings in the two cases and announce a clear rule.[1]

Given the undisputed circuit split regarding a party's ability to create retroactive diversity jurisdiction by unilaterally changing its citizenship, Dataflux's petition for writ of certiorari should be granted and this important issue should receive the benefit of full briefing on the merits. The issue has been resolved differently by these circuits, and a clear answer regarding *Caterpillar*'s scope is needed. Allowing this split to remain unresolved and jurisdictional rules to become muddled does not serve any useful purpose.

---

1. As shown in Dataflux's petition for writ of certiorari, the Fifth Circuit's decision also directly conflicts with numerous decisions holding that a party's unilateral change in citizenship after litigation has commenced cannot retroactively create diversity jurisdiction that did not exist at the time suit was filed. Pet. for Writ of Cert., pp. 12-13 n.2.

II. *Caterpillar* Does Not Authorize the Fifth Circuit's New Exception to the Longstanding Limits on Diversity Jurisdiction

In contrast with the Fifth Circuit, the D.C. Circuit in *Saadeh* properly refused to extend *Caterpillar* beyond its context to allow a party to create retroactive diversity jurisdiction by unilaterally changing its citizenship after suit is filed. *Saadeh*, 107 F.3d at 56-57. The D.C. Circuit (and Judge Garza in dissent) correctly recognized that such a broad exception effectively creates a new rule in direct conflict with the longstanding rule requiring diversity jurisdiction to be determined based on the parties' citizenship and circumstances at the time suit is filed. *Id.*; *see also Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168, 175 (5th Cir. 2002) (Garza, J., dissenting).[2]

The Respondents erroneously suggest that the Fifth Circuit's expansive interpretation of *Caterpillar* somehow prevents jurisdictional manipulation by unscrupulous defendants. Brief in Opposition, p. 6. According to the Respondents, a defendant could delay asserting a challenge to a district court's subject matter jurisdiction until after the defendant learns the jury's verdict. *Id.* If the defendant does not like the jury's verdict, it could then "unwind the entire case" by objecting to the court's jurisdiction before judgment is entered. *Id.*

---

2. Even the panel majority in this case acknowledged, albeit in an understated fashion, that its holding expanded this Court's holding in *Caterpillar*. *Atlas Global Group, L.P.*, 312 F.3d at 173 ("However, our holding today has only a slightly greater effect on the general rule than would the strictest construction of *Caterpillar*.").

The Respondents' argument fails because it is black-letter law that parties cannot consent to a court's subject matter jurisdiction if it does not exist and parties cannot waive their right to challenge a court's subject matter jurisdiction. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings."). Furthermore, a far greater risk of manipulation is created by the Fifth Circuit's new rule, which allows a plaintiff to sue first and worry about establishing federal jurisdiction later.

III. The Fifth Circuit's Unworkable New Exception to the Longstanding Limits on Diversity Jurisdiction Undermines Fundamental Public Policy Interests

The Respondents cannot plausibly contend that the Fifth Circuit's decision serves public policy concerns by preventing "inconsistent factfindings." Brief in Opposition, p. 11. The Respondents overlook the fact that all federal courts, including federal appellate courts, already have the authority – and the duty – to dismiss a case at any stage of the litigation (post-verdict or otherwise) when subject matter jurisdiction does not exist. *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 702 ("[A] court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.").

Even if a case is dismissed for lack of subject matter jurisdiction after a jury has reached a verdict, a second trial resulting in a different verdict does not create "inconsistent

factfindings." Once the original case is dismissed for lack of jurisdiction, the original jury verdict becomes a nullity. A verdict in a case that is retried after being dismissed for lack of subject matter jurisdiction does not create "inconsistent factfindings" any more than does a verdict in a case retried after an appellate court remands for a new trial.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted. The judgment of the court of appeals should be reversed, and judgment should be rendered dismissing this case for lack of subject matter jurisdiction.

Respectfully submitted,

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GRUPO DATAFLUX,

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ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 14, 2003
CERTIORARI GRANTED OCTOBER 14, 2003

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Memorandum And Order Of The United States District Court For The Southern District Of Texas, Houston Division Dated And Entered December 6, 2000 ..... 20a

Order Of The United States District Court For The Southern District Of Texas, Houston Division Dated And Entered January 5, 2001 ..... 23a

Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing And Rehearing En Banc Dated And Filed February 17, 2003 ..... 25a

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ATLAS GLOBAL GROUP V. GRUPO DATAFLUX, ET AL

01-20245

Court of Appeals Docket #: 01-20245
Nsuit: 4190 Contract: Other
Atlas Global Group v. Grupo Dataflux, et al
Appeal from: Southern District of Texas, Houston

- -

Lower court information:

District: 0541-4 : H-97-CV-3779
Trial Judge: Frances H Stacy, US Magistrate Judge
Court Reporter: Bruce Slavin, Court Reporter
Court Reporter: Tape - SR, Sheila Roque
Date Filed: 11/18/97
Date order/judgment: 12/6/00
Date NOA filed: 2/2/01

- -

Fee status: Paid

- -

Prior cases:

None

Current cases:

None

Docket as of May 28, 2003 11:10 pm

Appendix A

ATLAS GLOBAL GROUP, LP Plaintiff - Counter Defendant - Appellant	Roger B Greenberg FAX 713-752-0327 713-752-0017 Suite 2000 [COR LD NTC ret] Schwartz, Junell, Campbell & Oathout 909 Fannin Street 2 Houston Center Houston, TX 77010
OSCAR ROBLES-CANON, officer with Atlas Global Group Counter Defendant - Appellant	Roger B Greenberg (See above) [COR LD NTC ret]
FRANCISCO LLAMOSA, officer with Atlas Global Group Counter Defendant - Appellant	Roger B Greenberg (See above) [COR LD NTC ret]

v.

Appendix A

GRUPO DATAFLUX Defendant - Counter Claimant - Appellee	William Joseph Boyce FAX 713-651-5246 713-651-5151 Suite 5100 [COR LD NTC ret] Julie H Tellepsen 713-651-5151 Suite 5100 [COR NTC ret] Fulbright & Jaworski 1301 McKinney Street Houston, TX 77010-3095
	Mark Allen Robertson FAX 212-318-3400 212-318-3000 [COR NTC ret] Fulbright & Jaworski 666 5th Street New York, NY 10103

Appendix A

01-20245

ATLAS GLOBAL GROUP, LP

Plaintiff - Counter Defendant - Appellant

and

OSCAR ROBLES-CANON, officer with Atlas Global Group; FRANCISCO LLAMOSA, officer with Atlas Global Group

Counter Defendants - Appellants

3/14/01	Private civil diversity case docketed. NOA filed by Appellant Atlas Global Group, Appellant Oscar Robles-Canon, Appellant Francisco Llamosa. [01-20245] (cdd)

* * *

2/6/02	Oral argument heard. Case argued by Roger B Greenberg for Appellant Francisco Llamosa, Appellant Oscar Robles-Canon, Appellant Atlas Global Group, William Joseph Boyce for Appellee Grupo Dataflux [01-20245] (pft)
11/22/02	Opinion filed. If Published # of pages: 5 Issue Mandate due on 12/13/02. [01-20245] (kgc)
11/22/02	Judgment entered and filed. [01-20245] (kgc)
12/6/02	Petition filed by Appellee Grupo Dataflux for rehearing. # of copies filed: 4 [4037592-1] Issue Mandate ddl canceled. Date of COS: 12/5/02 Sufficient [Y/N]: Y [01-20245] (kkf)

Appendix A

12/6/02	Petition filed by Appellee Grupo Dataflux for rehearing en banc. # of copies filed: 20 [4037594-1] Date of COS: 12/5/02 Sufficient [Y/N]: Y [01-20245] (kkf)

* * *

2/17/03	COURT Order filed denying petition for rehearing [4037592-1], denying petition for rehearing en banc [4037594-1] With poll (Y/N)?: N (EMG dissenting for the same reasons as stated in the opinion) Issue Mandate due on 2/24/03. Copies to all counsel. [01-20245] (rjd)
2/24/03	Motion filed by Appellee Grupo Dataflux to stay the issuance of the mandate until 5/19/03 [4109833-1] Response/Opposition due on 3/10/03. Date of COS: 2/21/03 Sufficient [Y/N]: n, no certificate of conference [01-20245] (ams)

* * *

3/25/03	COURT Order filed granting motion to stay mandate pending petition for writ of certiorari until 05/18/03. [4109833-1] The stay is in force until the final disposition of the case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court advising that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this stay unless the certificate is filed with the clerk

of this court within that time. Issue Mandate ddl updated to 5/20/03. (CES) Copies to all counsel. [01-20245] (jtt)

5/16/03 Notice filed by Appellee Grupo Dataflux advising that 5/15/03, Grupo Dataflux filed its petition for writ of certiorari to the Supreme Court. [4193502-1] [01-20245] (jmw)

5/28/03 Supreme Court notice that petition for certiorari was filed on 05/14/03 by Appellee Grupo Dataflux. Supct No.: 02-1689 [01-20245] (cav)

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON

U.S. District Court
TXS - Southern District of Texas (Houston)

CIVIL DOCKET FOR CASE #: 97-CV-3779

Atlas Global Group v. Grupo Dataflux

Filed: 11/18/97
Assigned to: Magistrate Judge Frances H Stac ury demand: Plaintiff
Demand: $0,000
Nature of Suit: 190
Lead Docket: None
Jurisdiction: Diversity
Dkt# in other court: None
Cause: 28:1331 Fed. Question: Breach of Contract

ALAN F LEVIN
mediator

Alan F Levin
[NTC] [PRO SE]
Levin, Roth and Kasner, p.c.
500 Summit Tower
Eleven Greenway Plaza
Houston, TX 77046
713/877-1600

Appendix B

==========

ATLAS GLOBAL GROUP, L.P. plaintiff	Roger B Greenberg 713-752-0327 fax [COR LD NTC] Schwartz Junell et al 909 Fannin Ste 2000 Houston, TX 77010 713-752-0017

v.

GRUPO DATAFLUX defendant	Mark Allan Robertson 713-651-5246 [COR LD NTC] Fulbright & Jaworski 1301 McKinney St Ste 5100 Houston, TX 77010-3095 713-651-5232

==========

GRUPO DATAFLUX counter-claimant	Mark Allan Robertson 713-651-5246 [COR LD NTC] Fulbright & Jaworski 1301 McKinney St Ste 5100 Houston, TX 77010-3095 713-651-5232

Appendix B

v.

ATLAS GLOBAL GROUP, L.P. counter-defendant	Roger B Greenberg 713-752-0327 fax [COR LD NTC] Schwartz Junell et al 909 Fannin Ste 2000 Houston, TX 77010 713-752-0017

==========

OSCAR ROBLES-CANON, officer with Atlas Global Group counter-defendant	Roger B Greenberg 713-752-0327 fax [COR LD NTC] Schwartz Junell et al 909 Fannin Ste 2000 Houston, TX 77010 713-752-0017

FRANCISCO LLAMOSA, officer with Atlas Global Group counter-defendant	Roger B Greenberg (See above) [COR LD NTC]

Appendix B

DATE	#	IMG	DOCKET ENTRY
11/18/97	1		COMPLAINT filed; FILING FEE $150 RECEIPT # 472861 (miw)
			* * *
6/17/98	9		MOTION with memorandum of law in support to dismiss, or in the alternative, to transfer venue by Grupo Dataflux, Motion Docket Date 7/7/98 [9-1] motion, 7/7/98 [9-2] motion , filed (lt) [Entry date 06/18/98]
			* * *
11/16/98	19		MEMORANDUM AND ORDER denying Grupo Dataflux's [9-1] motion to dismiss; denying [9-2] motion to transfer venue, entered. Parties notified. (signed by Judge Ewing Werlein Jr) (ym) [Entry date 11/18/98]
11/30/98	20		ORIGINAL ANSWER to Complaint and COUNTERCLAIM by Grupo Dataflux against Atlas Global Group, filed (lt)
12/9/98	21		MOTION for leave to add counterdefts by Dataflux SA de CV sued as Grupo Dataflux, Motion Docket Date 12/29/98 [21-1] motion, filed. (lt) [Entry date 12/10/98]
12/9/98	22		FIRST AMENDED COUNTERCLAIM by Dataflux SA de CV sued as Grupo Dataflux adding counterdefts Oscar Robles-Canon and Francisco Llamosa: amending [20-2] counterclaim, filed. (lt) [Entry date 12/10/98]
			* * *

Appendix B

12/16/98	23		ANSWER by Atlas Global Group LP to deft's [20-2] original counter claim, filed. (lt)
12/21/98	24		ANSWER by Atlas Global Group LP to [22-1] first amended counterclaim, filed. (lt) [Entry date 12/22/98]
			* * *
1/7/99	29		ORDER granting counterpltf's [21-1] motion for leave to add counterdefts, entered; counterpltf Grupo Dataflux shall proceed to serve counterdefts Francisco Llamosa and Oscar Robles-Canon with all due haste. Parties notified. (signed by Magistrate Judge Frances H. Stacy) (lt)
			* * *
2/1/99	30		MOTION to dismiss, or in the alternative for more definite statement by Francisco Llamosa, Motion Docket Date 2/21/99 [30-1] motion, 2/21/99 [30-2] motion, filed. (lt) [Entry date 02/02/99]
			* * *
2/22/99	31		RESPONSE by Dataflux SA de CV in opposition to Francisco Llamosa's [30-1] motion to dismiss or [30-2] motion for more definite statement , filed (lt)
			* * *

Appendix B

6/8/99 34 MEMORANDUM AND ORDER denying Llamosa's [30-1] motion to dismiss and his alternative motion to require Deft dataflux to replead is GRANTED; and if Deft Dataflux fails to file a Second Amended Counterclaim in the form of a more definite statement within fourteen (14) days after the date of entry of this Order, Llamosa may then reurge his Motion to Dismiss , entered. Parties notified. (signed by Judge Ewing Werlein Jr) (hl) [Entry date 06/09/99]

* * *

6/23/99 37 Second AMENDED COUNTERCLAIM by Grupo Dataflux: amending [22-1] amended claim, filed. (ps)

7/14/99 38 ANSWER by Francisco Llamosa to [37-1] second amended counterclaim, filed. (lt)

7/14/99 39 ANSWER by Atlas Global Group to [37-1] second amended counterclaim, filed. (lt)

* * *

10/14/99 42 ANSWER by Oscar Robles to [37-1] second amended counterclaim, filed. (lt) [Entry date 10/15/99]

* * *

Appendix B

11/15/99 44 MOTION for leave to file ast amd complt filed by Atlas Global Group. Motion Docket Date 12/5/99 [44-1] otion. (nd) [Entry date 11/16/99]

11/15/99 45 FIRST AMENDED COMPLAINT marked exhibit A to motion for leave to amend filed by Atlas Global Group amending [1-1] complaint. Answer due 11/25/99 for Grupo Dataflux. (nd) [Entry date 11/16/99]

11/17/99 46 ORDER granting [44-1] motion for leave to file 1st amd cmplt , entered; Parties notified. (signed by Judge Ewing Werlein Jr) (kh) [Entry date 11/18/99]

* * *

8/25/00 79 JOINT PRE-TRIAL ORDER by Atlas Global Group, Grupo Dataflux, Oscar Robles-Canon, Francisco Llamosa, filed (ks) [Entry date 08/28/00]

* * *

9/29/00 — Rec'd Consent to Proceed before a Magistrate, signed by parties, frwd to CRD (ps) [Entry date 10/02/00]

10/3/00 96 CONSENT to trial by Magistrate by Atlas Global Group, Grupo Dataflux and ORDER TRANSFERRING CASE (Signed by Judge Ewing Werlein, Jr) to Magistrate Judge Frances H. Stacy, entered. Parties ntfd. (ps) [Entry date 10/04/00]

* * *

Appendix B

10/19/00 106 MINUTES OF 1ST DAY JURY TRIAL held before Magistrate Judge Frances H Stacy on 10/19/00: Atty App(s): Greenberg, Hodges, Zeller, Waits, Lamosa/Co-Rep, f/Pltf, Robertson, Carpizo, Dreyer f/Defts, (Guillermo Salinas, President of Dataflux), Ct Rptr - Brent Laswell, Jury impaneled, Jury seated, Trial to begin on 10/23/00; Motions in Limine ruled on as stated on the record, filed (ks) [Entry date 10/27/00]

* * *

10/23/00 111 MINUTES OF 2ND DAY JURY TRIAL held before Magistrate Judge Stacy on 10/23/00: Atty App(s)/Ct Rptr same as previous day, Trial begins, Evidence presented, Pltfs calls Oscar Robles, filed (ks) [Entry date 10/27/00]

* * *

10/24/00 113 MINUTES OF 3RD DAY JURY TRIAL held before Magistrate Judge Frances H Stacy on 10/24/00: Atty(s)/Ct Rptr - same a previous day, Evidence presented, Pltf's witnesses called, filed (ks) [Entry date 10/27/00]

10/25/00 114 MINUTES OF 4TH DAY JURY TRIAL held before Magistrate Judge Frances H Stacy on 10/25/00: Atty App(s)/Ct Rptr - same as previous day, Evidence presented, Evidence concluded, Court's charge to the jury, Pltf's witnesses called, Pltf rest, Deft's motion for

Appendix B

judgment as a matter of law denied, Deft's witnesses called, Pltf motions for a directed verdict denied, Deft rest, Pltf recalls Oscar Robles, filed (ks) [Entry date 10/27/00]

10/26/00 115 MINUTES OF 5TH DAY JURY TRIAL held before Magistrate Judge Frances H Stacy on 10/26/00: Atty App(s)/Ct Rptr - same as previous day, Final Arguments heard, Jury deliberating, filed (ks) [Entry date 10/27/00]

* * *

10/27/00 117 MINUTES OF 6TH DAY JURY TRIAL held before Magistrate Judge Frances H Stacy on 10/27/00: Atty App(s)/Ct Rptr - same as previous day, Jury deliberating and Trial Ends, filed (ks)

10/27/00 118 COURT'S CHARGE TO THE JURY, filed (ks)

* * *

11/8/00 123 MOTION to dismiss for lack of jurisdiction by Grupo Dataflux, Motion Docket Date 10/28/00 [123-1] motion, filed. (hl) [Entry date 11/09/00] [Edit date 11/09/00]

11/8/00 124 MEMORANDUM by Grupo Dataflux in support of [123-1] motion to dismiss for lack of jurisdiction, filed (hl) [Entry date 11/09/00]

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11/22/00 125 RESPONSE by Atlas Global Group to [123-1] motion to dismiss for lack of jurisdiction, filed. (hl) [Entry date 11/24/00]

11/27/00 126 REPLY by Deft Dataflux to Atlas' Response to Deft's [123-1] motion to dismiss for lack of subject matter jurisdiction, filed (ks) [Entry date 11/28/00]

11/28/00 127 SUR-REPLY by Pltf Atlas Global Group to Deft's [123-1] motion to dismiss for lack matter jurisdiction, filed (ks) [Entry date 11/29/00]

11/30/00 128 MOTION to enter judgment by Pltf Atlas Global Group, Francisco Llamosa and Oscar Robles-Canon, Motion Docket Date 12/20/00 [128-1] motion, filed. (ks) [Entry date 12/01/00]

12/6/00 129 MEMORANDUM AND ORDER that Deft's [123-1] motion to dismiss for lack of subject matter jurisdiction is GRANTED and this case is DISMISSED WITHOUT PREJUDICE; the statute of limitations for the claims alleged in this case is STAYED from 11/18/97, the date this case was filed, until ten days after the entry of this order, to allow Pltf to refile this case in the appropriate forum, entered. Parties notified. (signed by Magistrate Judge Frances H. Stacy) (ks)

Appendix B

12/6/00 — Case closed (ks)

12/15/00 130 MOTION to alter judgment, and to amend judgment by Pltf Atlas Global Group, Motion Docket Date 1/4/01 [130-1] motion, 1/4/01 [130-2] motion, filed. (ks) [Entry date 12/18/00]

12/18/00 131 SUPPLEMENT and Correction to [130-1] motion to alter judgment and [130-2] to amend judgment by Atlas Global Group, filed. (ks) [Entry date 12/19/00]

1/4/01 132 RESPONSE by Dataflux SA de CV to pltf's [130-1] motion to alter judgment or [130-2] motion to amend judgment, filed. (lt)

1/5/01 133 ORDER denying Pltf's [130-1] motion to alter judgment; denying Pltf's [130-2] motion to amend judgment, entered; Parties notified. (signed by Magistrate Judge Frances H. Stacy) (ym)

1/31/01 134 NOTICE to Correct Immaterial Fact by Pltf Atlas Global Group, filed (ks) [Entry date 02/01/01]

2/2/01 — Appeal Filing Fee Paid; FILING FEE $ 105.00 RECEIPT # 507286 (hl)

2/2/01 135 NOTICE OF APPEAL of [133-1] order, [129-1] order by Atlas Global Group, Oscar Robles-Canon, Francisco Llamosa, filed. Fee Status: Pd Receipt #: 507286 (bwd) [Entry date 02/27/01]

APPENDIX C — PLAINTIFF'S ORIGINAL COMPLAINT FILED NOVEMBER 18, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H 97 3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

v.

GRUPO DATAFLUX,

Defendant.

JURY TRIAL DEMANDED

PLAINTIFF'S ORIGINAL COMPLAINT

COMES NOW, Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., Plaintiff in the above-captioned cause, and files this its Original Complaint against Defendant Grupo Dataflux and would respectfully show this Court as follows:

I. PARTIES

1. Plaintiff, Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., is a limited partnership with its principal place of business located at 5847 San Felipe, Houston, Texas 77057.

2. Defendant Grupo Dataflux is a Mexican business with its principal place of business in Monterrey, Mexico. Grupo

Dataflux can be served with citation and Plaintiff's Original Complaint by serving its president, Mr. Guillermo Salinas Pliego, Dataflux, S.A. de C.V., Carretera Nacional Km 2.71, Col. La Estanzuela, Monterey, N.L. 64988.

II. JURISDICTION AND VENUE

3. Federal jurisdiction is proper based upon diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), as this suit is between a Texas citizen and a citizen or subject of Mexico, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Seventy-Five Thousand ($75,000.00) Dollars.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391 for the following reasons:

(a) A substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this judicial district; and

(b) An alien can be sued in any district.

III. FACTUAL BACKGROUND

5. In 1996, Defendant Grupo Dataflux (hereinafter "Dataflux") was interested in financial expansion of its microcomputer wholesale distribution company based in Monterrey, Mexico. Dataflux believed it could increase its market share through the expansion of its warehouse facilities, upgrading its management information system, broadening its product mix, increasing its working capital,

and by advancing payments to its suppliers to acquire discounts. Dataflux, however, could not reach its goals alone: Dataflux needed a financial advisor to assist in the creation and implementation of a capital growth plan.

6. As part of its goal to implement its plan to expand, Dataflux sought the financial expertise of Plaintiff Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., (hereinafter "Atlas"), a limited partnership based in Houston that specializes in financial advice and consultation and equity placement. In June 1996, Atlas and Dataflux initially met to discuss their possible teaming. After these initial meetings, Atlas's management was excited about helping Dataflux grow in the marketplace. Atlas's experienced team of investment professionals was prepared to introduce Dataflux to sophisticated international investors and to assist Dataflux in becoming a major financial player in the computer industry.

7. With Dataflux's needs and priorities in mind, Atlas prepared and proposed an approach for raising capital for Dataflux's growth. In exchange for becoming Atlas's exclusive financial advisor and securities placement agent, Atlas promised to (1) assist Dataflux in preparing required disclosure documents; (2) identify and contact selected qualified investors acceptable to Dataflux; (3) arrange for potential investors and conduct business investigations; and (4) negotiate the financial aspect of any proposed transaction under Dataflux's guidance. In exchange, Dataflux promised to use Atlas exclusively, in addition to promising to fairly compensate Atlas for financial guidance and for locating investors for the placement of its securities.

8. Relying upon Dataflux's representations of its devotion to their joint effort to facilitate the Dataflux's growth, Atlas entered into a written agreement with Dataflux on or about August 28, 1996. In their written agreement, Dataflux appointed Atlas as its **exclusive** financial advisor and securities placement agent, as follows:

> This letter agreement ("this Agreement") confirms our understanding that Grupo Dataflux (which, together with any subsidiaries and affiliates, is hereinafter referred to as the "Company") **has engaged Atlas Financial Group, L.P. to act as its exclusive financial advisor and securities placement agent** commencing upon the Company's acceptance of this Agreement, in connection with locating, evaluating and selecting potential investors located in the United States or elsewhere for the private placement of securities of the Company (a "Transaction").

(emphasis added).

The exclusive relationship between Atlas and Dataflux was clearly evidenced in their agreement:

> **Exclusivity.** In order to coordinate our efforts with respect to a possible placement or sale of securities satisfactory to the Company, **during the period of our engagement hereunder neither the Company nor any representative thereof (other than Atlas) will initiate discussions regarding a placement or sale of securities**

> **except through Atlas. In the event the Company or its management receives an inquiry regarding the placement or sale of securities from a third party, it will promptly advise Atlas of such inquiry** in order that Atlas may evaluate such prospective purchaser and its interest and assist the Company in any resulting negotiations.

In further recognition of the need for full and complete cooperation between the two parties in the effort to successfully place Dataflux's securities, Dataflux contractually agreed to fully cooperate and assist Atlas' endeavors:

> **Cooperation by the Company.** Atlas and the Company are committed to work together in order to consummate Transactions benefitting the Company. The Company agrees that it will use its reasonable best efforts to fully cooperate and assist Atlas in the process of seeking, evaluating, and completing Transactions.

9. Relying on Dataflux's good faith promise and contractual obligations regarding exclusivity and cooperation, Atlas devoted hundreds of hours of research to collect data for the creation of a private placement memorandum which would provide relevant financial and investment information to potential investors. On or about October 30, 1996, Atlas completed the private placement memorandum, which included a detailed discussion of Dataflux and its subsidiaries, the offering of its securities, the dividend policy, capitalization, Dataflux's financial condition, financial projections, investment considerations,

the company's facilities, business strategy, as well as other related information. When the private placement memorandum was completed, Atlas took Dataflux to the international capital market.

10. Throughout November and December 1996, and January 1997, Atlas worked diligently and aggressively to introduce Dataflux to potential investors. By January 28, 1997, Atlas had contacted more than 80 potential investors to promote Dataflux's private equity placement, including:

> Soros Group, Tiger Group, Harvard Management Company, Inc., Fenway Partners, Calpers, The Sprout Capital Group, Biltmore Emerging Markets, Lazard Emerging Markets, Govett Emerging Markets, Lexington Worldwide EM, T. Rowe Price EM Stock, Martin Currie, Strome Sussking Investment Management, L.P., First Reserve, HSBC Asset Management, Montgomery Asset Management, Salomon Brothers, Willis, Stein & Partners, Janus, Schooner Asset Management Co., WestSphere Capital Associates, Brandes Investment Partners, L.P., Bessemer Trust, KIO, Scottish Equitable, Banesto, Fenway Partners, Inc.; Mercury Asset Management; Hicks, Furst Muse & Tate; Legal & General; Murray Johnstone; Schroeders; ABN Amro; Bank Scandina; Gartmore; Edinburg Fund Managers; Citibank; Clariden; Hermes; Kleinworth Benson; NM Rothchild; Robert Fleming; Standard Life; Stewart Life; Stewart Ivory; Investment Bank of Ireland; State of Wisconsin Board of Investors;

Trust Company of the West/Latin America; Mercator; Interfunds, Inc.; Patricof & Co. Ventures, Inc.; Castile Capital Corp.; Bank of America; GT Capital Management; Fidelity Investments; Alliance Capital; IDS; Founders; Goldman Sachs; Nomura Capital Management; Merrill Lynch Asset Management; Kingdon Capital; Putnam Investments; Northern Trust; Northwestern Mutual; RCM Capital; Roney Capital Partners; Rothchild Emerging Markets; Scudder; Templeton; Tennenbaum & Co.; Strong Capital Management; Nicholas Applegate; Bank of New York; Texas Pacific Group (Newbridge Latin America); Darby Overseas Investments, Ltd.; Bastion Capital Corporation; Farallon Capital Management, Inc.; Electra Inc.; JP Morgan; Deltec Asset Management Corporation; Moore Capital; Morgan Stanley Asset Management; and Merrill Lynch Private Equity Group.

11. Throughout this period, Atlas continually provided financial advice and guidance to Dataflux. Atlas specifically provided Dataflux needed critical feedback Atlas had received from its numerous meetings and negotiations with potential investors in the marketplace regarding Dataflux's potential placement/sale of securities.

12. By the end of January 1997, three investors were seriously interested in Dataflux. By January 31, 1997, Dataflux rejected one of the potential investors. During January and February 1997, Atlas continued aggressive negotiations with potential investor DLJ regarding its interest

in Dataflux's securities. In February, DLJ visited Dataflux's office in Mexico. On or about February 28, 1997, Atlas communicated DLJ's proposal to Dataflux. To Atlas's surprise, Dataflux rejected this reasonable offer on or about March 3, 1997. On or about the same day, Dataflux notified Atlas that although Dataflux was enormously satisfied with Atlas's services, Dataflux was going to seek another alternative for placement of its securities.

13. In truth of fact, Dataflux had been surreptitiously negotiating with some third parties (*i.e.*, behind Atlas's back) for several months. Despite the existence of the exclusive agency agreement with Atlas, Dataflux did not inform or include Atlas in certain negotiations regarding the placement of Dataflux's securities as required by their agreement, which explicitly named Atlas as Dataflux's ***exclusive*** financial advisor and securities placement agent.

14. Notwithstanding Atlas's diligence, hard work or the existence of a fair and reasonable offer from a private investor, Dataflux had redirected its interests and desired to take the company public, instead of concentrating on and cooperating in the private placing its securities contrary to the advice of Atlas. Dataflux even encouraged Atlas to expend time and money to get an offer from DLJ, while simultaneously, Dataflux clandestinely focused on taking the company public with another investment bank.

15. Dataflux's "use them and lose them" way of doing business became more pronounced when Dataflux went public in Mexico by taking advantage of all of the work performed by Atlas during the last nine months. In July 1997,

the initial public offering of Dataflux stock was held. Dataflux used the private placement memorandum prepared by Atlas as a model for the disclosure document used in connection with Dataflux's public offering in Mexico without the knowledge, authority, or permission of Atlas.

16. Dataflux simply attempted to eliminate Atlas from the picture. Atlas, however, is **at a minimum** entitled to compensation from Dataflux pursuant to the Termination Clause of their agreement:

> If at any time prior to one year after the termination of this Agreement a Transaction is consummated with a party with whom or which Atlas communicated regarding a potential Transaction during the term of this Agreement, Atlas will be entitled to payment in full of the compensation described above. Promptly following any termination of this Agreement, Atlas will provide the Company with written notice of the parties with whom or which Atlas communicated regarding a Transaction during the period of our engagement.

In accordance with the Termination Clause, Atlas provided Dataflux with written notice of the parties with whom or which Atlas had communicated regarding the potential placement of Dataflux's securities:

> Abbey Life; ABN Amro; Advent International Corp.; Alliance Capital; Austin Ventures; BancBoston Capital, Inc.; Banco BBA Creditansatalt, S.A.;

> Banesto; Bank of America; Bank of New York; Bank Scandinave; Bankers Trust Co.; Bassini, Playfair & Associates, LLC; Bation Capital Corp.; BEA Associates; Bear, Stearns & Co.; Bechtel Enterprises, Inc., Benedetto, Gartland & Greene; Bessemer Trust; Biltmore Emerging Markets; Blackstone Group; Brandes Investment Partners, L.P.; Brinson Partners, Inc.; CALPERS; Casa de Bolsa Bancomer; Castile Capital Corp.; Chase Capital Partners (Mex-Capital); Citibank; Clariden; Clerical Medical; Credit Lyonnis Securities; Darby Overseas Investments, Ltd.; Deltec Asset Management, Corp.; Donaldson, Lufkin, Jenrette; Dunieden; DWS; Edinburgh Fund Managers; Elektra Fleming, Inc.; Farallon Capital Management, Inc.; Fenway Partners, Inc.; Fidelity Investments; First Madison Securities; First Reserve; First Union Capital Partners; Foreign & Colonial; Founders; G.E. Capital Corp./ Equity Capital Group; Gartmore; General Motors Pension Fund; Genesis; Global Emerging Markets of America; Goldman, Sachs & Co.; Govett Emerging Markets; GT Capital Management; Hambrecht & Quist; Harvard Management Company, Inc.; Hermes, Hicks, Muse, Tate & Furst, Inc.; HSBC Asset Management; IDS; Interfunds, Inc.; Investment Bank of Ireland; Ivory & Sime; Janus; JP Morgan Capital Corp.; Kingdon Capital; KIO; Kleinwort Benson; Latin America Enterprise Fund, L.P.; Lazard; Lazard Freres Asset Management; Legal & General; Lexington Worldwide EM; Liberty Mutual Insurance Co.;

Lombard Odier; Martin Currie; Mercator; Mercury Asset Management; Merrill Lynch & Co.; Merrill Lynch Asset Management; Merrill Lynch Private Equity Group; Montgomery Asset Management; Moore Capital; Morgan Grenfell; Morgan Stanley & Co.; Morgan Stanley Asset Management; Murray Johnstone; NM Rothchild; Nomura Capital Management; Northern Trust; Northwestern Mutual; Oppenheimer & Co.; Paine Webber, Inc.; Paribas; Patricof & Co. Ventures, Inc.; PIMCO Equity; Pioneer Emerging Markets; Prudential Securities; Putnam Investments; RCM Capital; Robeco; Robert Fleming; Roney Capital Partners; Rothchild EM; Rowe Price Fleming; Salomon Brothers; Santander Investment Securities; SBC; Schooner Asset Management; Schroeders; Scottish Equitable; Scottish Widows; Scudder, Stevens & Clark, Inc.; Select Capital; Smith Barney; Soros Group; Standard Life; State of Wisconsin Board of Investors; Stewart Ivory; Strome Susskind Investment Management, L.P., Strong Capital Management; T. Rowe Price; TCW/Latin American Partners, LLC; Teachers Insurance and Annuity; Templeton; Tennenbaum & Co.; Texas Pacific Group, Inc. (Newbridge Latin America); The Common Fund; The Sprout Captial Group; Threadneedle Investment Managers, Ltd.; Tiger Group; UBS; Vanguard; Westsphere Capital Associates; Wexford Management, L.P.; Willis, Stein & Partners; and Zemi Investments.

Because the initial public offering of Dataflux's stock occurred within one year after the termination of the Atlas/ Dataflux agreement and the transaction involved Santander Investment Securities, one of the companies listed by Atlas in the written notice, Dataflux owes Atlas payment in full of the 3.8 percent commission. In spite of Atlas's compliance with this provision, Dataflux has refused to compensate Atlas pursuant to the Termination Clause.

17. Additionally, Dataflux is required to compensate Atlas for its work pursuant to the Good Faith Negotiation Clause:

> **Good Faith Negotiation.** It is understood that if the Company completes a transaction in lieu of any Transaction for which Atlas is entitled to compensation pursuant to this Agreement (including, but not limited to, the sale, merger, consolidation or any other business combination, in one or a series of transactions, involving all or a substantial amount of the business, securities, or assets of the Company, a recapitalization, or a partial or complete liquidation), Atlas and the Company will in good faith mutually agree upon acceptable compensation for Atlas taking into account, among other things, the results obtained and the custom and practice of investment bankers acting in similar transactions.

See Exhibit A, at page 8.

Notwithstanding Atlas's attempts to contact Dataflux to

discuss a mutually agreeable compensation for Atlas, Dataflux has not responded.

18. Dataflux failed and refused to pay the compensation and expenses due, and continues to fail and refuse to pay the compensation and expenses due. Thus, Atlas has been forced to file this lawsuit in order to obtain the compensation to which it is rightfully entitled.

IV.

FIRST CLAIM FOR RELIEF

Breach of Contract

19. Atlas realleges and incorporates each and every allegation of paragraphs 1 through 18 herein.

20. Atlas performed its obligations under the agreement required to be performed on its part.

21. Dataflux breached the Cooperation by the Company clause through its failure to use its reasonable best efforts to fully cooperate and assist Atlas in the process of seeking, evaluating, and completing Transactions.

22. Dataflux breached the Exclusivity Clause of the agreement by initiating discussions regarding a placement or sale of securities without informing or involving Atlas and/or by failing to promptly advise Atlas of third-party dealings regarding the placement or sale of Dataflux's securities.

23. Dataflux breached the Cash Compensation Clause by failing to pay Atlas 3.8 percent of the consideration Dataflux received for its initial public offering.

24. Dataflux breached the Good Faith Negotiation Clause by failing to compensate Atlas under such clause.

25. As a direct and proximate result of the breaches of the agreement by Dataflux, as set forth above, Atlas has sustained damages in the amount of not less than $1,348,000 with pre-judgment interest thereon at the legal rate. In addition, Atlas is entitled to recover its reasonable attorneys' fees pursuant to Texas Civil Practice and Remedies Code §§38.001 *et. seq.*

SECOND CLAIM FOR RELIEF (ALTERNATIVE)

Quantum Meruit

26. Atlas realleges and incorporates each and every allegation of paragraphs 1 through 25 herein.

27. In the alternative, Atlas would show the Court that on the instance and at the request of Dataflux, Atlas provided financial services and advice and created a private placement memorandum for Dataflux. Dataflux accepted the benefit of services provided by Atlas, yet has refused to pay for such benefits. Atlas would show that an action in *quantum meruit* lies against said Defendant for the reasonable value of financial services in the amount of not less than $1,348,000.

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WHEREFORE, ATLAS prays for judgment against Dataflux as follows:

1. On the first claim for relief (breach of contract), compensation, expenses, and costs due under the contract according to proof and in any event not less than $1,348,000;

2. On the second claim for relief (quantum meruit), compensation, expenses, and costs to fairly and adequately compensate Atlas for the services provided to Dataflux, and this amount should not be less than $1,348,000.

3. On each claim for relief, for general and special damages as proved at trial;

4. On all claims for relief, for prejudgment interest thereon, post judgment interest thereon, and all costs of suit;

5. For its reasonable attorneys fees as allowed by law; and

6. For such other and further relief as the Court may deem just and proper and any other relief to which it is entitled.

Appendix C

V.

JURY DEMAND

Plaintiff hereby requests a trial by jury on all issues.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

APPENDIX D — DEFENDANT'S ORIGINAL ANSWER AND COUNTERCLAIM FILED NOVEMBER 30, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

vs.

GRUPO DATAFLUX,

Defendant.

DEFENDANT'S ORIGINAL ANSWER AND COUNTERCLAIM

Defendant Dataflux S.A. de C.V., sued as "Grupo Dataflux," files this its answer and counterclaim to Plaintiff's Original Complaint.

1. With respect to paragraph 1 of the Complaint, defendant admits the allegations.

2. With respect to paragraph 2 of the Complaint, defendant admits that it was sued as "Grupo Dataflux," but denies the name is correct since its name is Dataflux S.A. de C.V.

3. With respect to paragraph 3 of the Complaint, defendant admits that plaintiff claims the controversy exceeds Seventy-Five Thousand Dollars (although defendant denies it owes plaintiff anything) and admits that the federal court has subject matter jurisdiction.

4. With respect to paragraph 4 of the Complaint, defendant denies the allegations.

5. With respect to paragraph 5 of the Complaint, defendant admits the allegations.

6. With respect to paragraph 6 of the Complaint, defendant admits that plaintiff held itself out to be a specialist in financial advice, consultation and equity placement, but denies that plaintiff was such a specialist. Defendant admits that plaintiff claimed that it was experienced, would introduce defendant to sophisticated international investors, and would assist defendant into becoming a major financial player, but defendant denies that plaintiff was any of those things or could do any of those things.

7. With respect to paragraph 7 of the Complaint, defendant admits the allegations contained in the first sentence, but denies the remainder of the allegations in paragraph 7.

8. With respect to paragraph 8 of the Complaint, defendant admits that it entered into an agreement with Dataflux but denies that the agreement can be interpreted except by reference to the entire agreement (although it admits that portions of the agreement are quoted) and denies the other allegations in the paragraph.

Appendix D

9. With respect to paragraph 9 of the Complaint, defendant does not have enough information to admit or deny the facts contained in the first sentence. Defendant admits the facts contained in the second sentence. With respect to the third sentence, defendant admits that the private placement memorandum was shared with a few potential investors, but otherwise denies the allegations.

10. With respect to paragraph 10 of the Complaint, defendant denies that Atlas worked diligently and aggressively and denies that those entities listed were potential investors. Defendant does not have enough information to admit or deny how many or what persons or entities plaintiff may have contacted and so it denies the allegations.

11. With respect to paragraph 11 of the Complaint, defendant denies the allegations.

12. With respect to paragraph 12 of the Complaint, defendant denies the allegations contained in the first, second and third sentences. Defendant never rejected any investor although it rejected one or more verbal offers that were not reasonable and not adequate. Defendant admits the allegations contained in the fourth and fifth sentences although defendant denies that any proposal from DLJ was made to defendant in writing. With respect to the allegations contained in the sixth sentence, defendant denies that the offer was reasonable. With respect to the seventh sentence, defendant denies that defendant was enormously satisfied with plaintiff's services.

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13. With respect to paragraph 13 of the Complaint, defendant denies the allegations.

14. With respect to paragraph 14 of the Complaint, defendant admits that it made a public offering, but denies the remaining allegations.

15. With respect to paragraph 15 of the Complaint, defendant denies the allegations.

16. With respect to paragraph 16 of the Complaint, defendant admits that a portion of the agreement between the parties is quoted but denies the remainder of the allegations.

17. With respect to paragraph 17 of the Complaint, defendant admits that a portion of the agreement between the parties is quoted but denies the remainder of the allegations.

18. With respect to paragraph 18 of the Complaint, defendant denies the allegations.

19. With respect to paragraph 19 of the Complaint, no response is necessary.

20. With respect to paragraph 20 of the Complaint, defendant denies the allegations.

21. With respect to paragraph 21 of the Complaint, defendant denies the allegations.

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22. With respect to paragraph 22 of the Complaint, defendant denies the allegations.

23. With respect to paragraph 23 of the Complaint, defendant denies the allegations.

24. With respect to paragraph 24 of the Complaint, defendant denies the allegations.

25. With respect to paragraph 25 of the Complaint, defendant denies the allegations.

26. With respect to paragraph 26 of the Complaint, no response is necessary.

27. With respect to paragraph 27 of the Complaint, defendant denies the allegations.

PLAINTIFF'S PRAYER

Defendant denies all the allegations contained in the six paragraphs of plaintiff's prayer.

DEFENSES

1. Plaintiff failed to provide the services that it claimed it would and could provide.

2. Plaintiff misled defendant by expressing a value that plaintiff would obtain for defendant's stock and then failing to obtain that value.

Appendix D

3. Defendant has not hired anyone other than plaintiff to conduct a private placement so the contract does not require defendant to pay plaintiff.

COUNTERCLAIM

Defendant brings this its counterclaim against plaintiff to recover its losses caused by plaintiff's fraudulent misrepresentations.

1. Prior to the time when the parties entered into their agreement, plaintiff-counterdefendant misled defendant-counterplaintiff by intentionally claiming that Atlas had contacts and expertise that would enable it to accomplish a successful private placement even though Atlas knew that it did not have the contacts and expertise to enable it to accomplish a successful private placement in the manner it claimed it could and would. As a result of those misrepresentations, Dataflux decided to hire Atlas to help it conduct a private placement. Atlas claimed that it would be able to conduct the private placement in a manner that would raise a certain amount of capita'. Atlas failed to accomplish such a private placement and failed to obtain the type of investment that it represented it would be able to obtain.

2. Because Dataflux hired Atlas as a result of the misrepresentations, Dataflux spent time and energy trying to achieve a private placement that in hindsight it realizes Atlas did not have the ability or connections to accomplish. Dataflux lost the value of having the capital it needed during the delay caused by Atlas' misrepresentations. Further, Dataflux employees spent time and money in working with

Atlas as a result of Atlas' misrepresentations. Because Atlas' fraudulent misrepresentations caused injury to Dataflux, Dataflux files this counterclaim to obtain its losses.

3. Dataflux also seeks punitive damages for the fraud committed by Atlas.

PRAYER

1. Defendant prays that plaintiff take nothing and that this Court grant all other relief defendant is entitled to receive.

2. Defendant seeks compensation for the damages caused by Atlas' fraudulent misrepresentations.

3. Defendant seeks punitive damages for Atlas' fraudulent misrepresentations.

Respectfully submitted,

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APPENDIX E — DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION FILED NOVEMBER 8, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff and Counterdefendant,

vs.

GRUPO DATAFLUX,

Defendant and Counterplaintiff.

DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3), Defendant, Dataflux S.A. de C.V. ("Dataflux") files this Motion to Dismiss for lack of subject matter jurisdiction. As is more fully described in the memorandum in support and the exhibits attached to that memorandum, dismissal is required in this case as a matter of law because subject matter jurisdiction does not exist.

1. Subject matter jurisdiction in this case is premised upon diversity of citizenship under 28 U.S.C. § 1332. No federal claims have been asserted. In order for subject

matter jurisdiction to exist in a diversity case, the citizenship of all the plaintiffs must be different from the citizenship of all the defendants.

2. In this case, complete diversity is lacking. When a limited partnership plaintiff asserts diversity jurisdiction, the citizenship of all the partners – limited partners as well as general partners – is analyzed to determine whether diversity exists. Defendant Dataflux is a Mexican corporation that was sued by Atlas, a limited partnership that has two alien limited partners – Oscar Robles Canon (a citizen of Mexico) and Heptagon Investments (a British Virgin Islands company). Because complete diversity is lacking, this Court does not have subject matter jurisdiction and the lawsuit must be dismissed. Fed. R. Civ. P. 12(h)(3).

For these reasons, and for the reasons more fully set forth in the attached memorandum and exhibits in support, Dataflux requests that this Court grant Defendant's motion to dismiss the lawsuit for lack of subject matter jurisdiction. Defendant further requests all other general and equitable relief to which it may be entitled.

Respectfully submitted,

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Appendix E

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APPENDIX F — MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION FILED NOVEMBER 8, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff and Counterdefendant,

vs.

GRUPO DATAFLUX,

Defendant and Counterplaintiff.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Dataflux S.A. de C.V. ("Dataflux") submits this memorandum in support of its motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3).

I. Diversity Jurisdiction Requires An Examination Of The Limited Partners' Citizenship.

Subject matter jurisdiction in this case is premised upon diversity of citizenship under 28 U.S.C. § 1332. Plaintiff's

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First Amended Complaint at 1-2, Ex. A. No claims under federal law have been made. *Id.* When an assertion of subject matter jurisdiction based upon diversity is made by a plaintiff that is a limited partnership, the citizenship of all the partners – limited partners as well as general partners – determines the citizenship of the partnership itself. *Carden v. Arkoma Associates*, 494 U.S. 185, 195 (1990). "[D]iversity jurisdiction in *any* suit 'by or against' a limited partnership depends on the citizenship of *all* its partners." *Whalen v. Carter*, 954 F.2d 1087, 1095 (5th Cir. 1992) (emphasis original). Here, the partners of Atlas Global Group, L.P. ("Atlas") include an individual who is a citizen of Mexico and a corporate entity which is a citizen of the British Virgin Islands. *See infra* section II. Defendant Dataflux is a Mexican Corporation. October 30, 1996 Private Placement Memorandum (Atlas' trial exhibit no. 2) at 1, relevant portion attached as Ex. B. Accordingly, complete diversity is lacking and jurisdiction is improper in this Court.

II. This Court Lacks Subject Matter Jurisdiction Because Two Limited Partners In The Plaintiff Are Aliens And The Defendant Is An Alien.

Atlas has three limited partners: Oscar Robles, Francisco Llamosa and Heptagon Investments. *See* Robles dep. at 6, Ex. C. Mr. Robles is a citizen of Mexico. *See id.* at 13, Ex. C.[1] In addition, Heptagon Investments is an "offshore

1. Mr. Robles testified at trial to living in Monterrey, Mexico and being a recipient of a Fulbright Scholar fellowship, which is a fellowship given by the Congress of the United States to citizens of foreign countries for study within the United States. Roger Greenberg asserted at trial that Mr. Robles is a citizen of Mexico.

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group." Marziale dep. at 9, Ex. D. At trial, Mr. Marziale testified that Heptagon Investments was incorporated in the British Virgin Islands. As explained in *Carden*, the citizenship of Mr. Robles and Heptagon Investments must be considered in determining the citizenship of Atlas. *Carden*, 494 U.S. at 195. Because Atlas has two limited partners who are aliens and because Dataflux is an alien, diversity jurisdiction does not exist. *See, e.g, Franceskin v. Credit Suisse*, 214 F.3d 253, 257 (2d Cir. 2000) (court of appeal vacated judgment *sua sponte* because no diversity jurisdiction existed between an Argentinian plaintiff and Swiss defendant "because federal courts lack subject matter jurisdiction over state law claims among aliens"); *Giannakos*, 762 F.2d at 1298 ("Diversity does not exist where aliens are on both sides of the litigation"). Without complete diversity, jurisdiction is improper in this Court. *E.g. American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951) (vacating judgment because no diversity jurisdiction existed even though defendant who lost the trial and who had removed the case to federal court did not challenge the court's jurisdiction until after trial); *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991) ("[I]n order for a federal court to assert diversity jurisdiction, diversity must be complete; the citizenship of all of the plaintiffs must be different from the citizenship of all of the defendants.").

"'[B]ecause the establishment of a basis for the exercise of subject matter jurisdiction is the *sine qua non* of federal litigation,' the Fifth Circuit has 'consistently held that it is the party who urges jurisdiction upon the Court who must always bear the burden of demonstrating that the case is one which is properly before the federal tribunal.'" *Riebe v.*

National Loan Investors, L.P., 828 F. Supp. 453, 455 (N.D. Tex. 1993) (*quoting B. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981)); *see also Stafford*, 945 F.2d at 804 (5th Cir. 1991) ("The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction."). Atlas has not demonstrated that diversity jurisdiction exists in this case despite its burden to do so.

III. The Motion To Dismiss Is Timely.

Federal Rule of Civil Procedure 12(h)(3) requires that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall dismiss the action*." Fed. R. Civ. P. 12(h)(3) (emphasis added). "The question of subject matter jurisdiction can never be waived. Nor can jurisdiction be conferred by conduct or consent of the parties." *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir. 1985). *See also Santos v. Alaska Bar Ass'n.*, 618 F.2d 575, 577 (9th Cir. 1980) (raising jurisdictional challenge for the first time on appeal). Subject matter jurisdiction can be raised by a party who invokes federal court jurisdiction after the party loses a trial on the merits. *American Fire*, 341 U.S. at 17-18 (vacating judgment because no diversity existed even though the defendant who removed the case to federal court did not file a motion complaining of jurisdiction until after the jury's verdict); *Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-595 (9th Cir. 1996) (vacating judgment against a "disappointed plaintiff" who raised the objection to jurisdiction after verdict because a plaintiff may "raise jurisdictional challenges at any time during the proceedings"). Accordingly, this motion is timely and should be granted.

CONCLUSION

For the foregoing reasons, defendant Dataflux S.A. de C.V. requests that this lawsuit be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(h)(3). Dataflux S.A. de C.V. further requests all additional relief to which it may be entitled.

Respectfully submitted,

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Appendix F

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-97-3779

JURY TRIAL DEMANDED

ATLAS GLOBAL GROUP, L.P.,

Plaintiff

vs.

GRUPO DATAFLUX,

Defendant

PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT

COMES NOW, Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., Plaintiff in the above-captioned cause, and files this its First Amended Original Complaint and would respectfully show this Court as follows:

I. PARTIES

1. Plaintiff, Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., is a limited partnership with its principal place of business located at 5847 San Felipe, Houston, Texas 77057.

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2. Defendant Dataflux S.A. de C.V. is a Mexican business with its principal place of business in Monterrey, Mexico. Dataflux S.A. de C.V. has appeared in this lawsuit and this First Amended Original Complaint can be served on its attorney of record Mark A. Robertson, Fulbright & Jaworski, 1301 McKinney, Suite 5100, Houston, Texas 77010-3095.

II. JURISDICTION AND VENUE

3. Federal jurisdiction is proper based upon diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), as this suit is between a Texas citizen and a citizen or subject of Mexico, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Seventy-Five Thousand ($75,000.00) Dollars.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391 for the following reasons:

(a) A substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this judicial district; and

(b) An alien can be sued in any district.

III. FACTUAL BACKGROUND

5. In 1996, Defendant Dataflux S.A. de C.V. (hereinafter "Dataflux") was interested in financial expansion of its microcomputer wholesale distribution company based in Monterrey, Mexico. Dataflux believed its could increase its

market share through the expansion of its warehouse facilities, upgrading its management information system, broadening its product mix, increasing its working capital, and by advancing payments to its suppliers to acquire discounts. Dataflux, however, could not reach its goals alone: Dataflux needed a financial advisor to assist in the creation and implementation of a capital growth plan.

6. As part of its goal to implement its plan to expand, Dataflux sought the financial expertise of Plaintiff Atlas Global Group, L.P., formerly known as Atlas Financial Group, L.P., (hereinafter "Atlas"), a limited partnership based in Houston that specializes in financial advice and consultation and equity placement. In June 1996, Atlas and Dataflux initially met to discuss their possible teaming. After these initial meetings, Atlas's management was excited about helping Dataflux grow in the marketplace. Atlas's experienced team of investment professionals was prepared to introduce Dataflux to sophisticated international investors and to assist Dataflux in becoming a major financial player in the computer industry.

7. With Dataflux's needs and priorities in mind, Atlas prepared and proposed an approach for raising capital for Dataflux's growth. In exchange for becoming Atlas's exclusive financial advisor and securities placement agent, Atlas promised to (1) assist Dataflux in preparing required disclosure documents; (2) identify and contact selected qualified investors acceptable to Dataflux; (3) arrange for potential investors and conduct business investigations; and (4) negotiate the financial aspect of any proposed transaction under Dataflux's guidance. In exchange, Dataflux

promised to use Atlas exclusively, in addition to promising to fairly compensate Atlas for financial guidance and for locating investors for the placement of its securities.

8. Relying upon Dataflux's representations of its devotion to their joint effort to facilitate the Dataflux's growth, Atlas entered into a written agreement with Dataflux on or about August 28, 1996. In their written agreement, Dataflux appointed Atlas as its exclusive financial advisor and securities placement agent, as follows:

> This letter agreement ("this Agreement") confirms our understanding that Grupo Dataflux (which, together with any subsidiaries and affiliates, is hereinafter referred to as the "Company") has engaged Atlas Financial Group, L.P. to act as its exclusive financial advisor and securities placement agent commencing upon the Company's acceptance of this Agreement, in connection with locating, evaluating and selecting potential investors located in the United States or elsewhere for the private placement of securities of the Company (a "Transaction").

(emphasis added).

The exclusive relationship between Atlas and Dataflux was clearly evidenced in their agreement:

> Exclusivity. In order to coordinate our efforts with respect to a possible placement or sale of securities satisfactory to the Company, during the period of

> our engagement hereunder neither the Company nor any representative thereof (other than Atlas) will initiate discussions regarding a placement or sale of securities except through Atlas. In the event the Company or its management receives an inquiry regarding the placement or sale of securities from a third party, it will promptly advise Atlas of such inquiry in order that Atlas may evaluate such prospective purchaser and its interest and assist the Company in any resulting negotiations.

Such exclusivity was not limited to a private placement, but rather any inquiry related to the placement or sale of securities from a third party.

9. In further recognition of the need for full and complete cooperation between the two parties in the effort to successfully place Dataflux's securities, Dataflux contractually agreed to fully cooperate and assist Atlas' endeavors:

> Cooperation by the Company. Atlas and the Company are committed to work together in order to consummate Transactions benefitting the Company. The Company agrees that it will use its reasonable best efforts to fully cooperate and assist Atlas in the process of seeking, evaluating, and completing Transactions.

10. Relying on Dataflux's good faith promise and contractual obligations regarding exclusivity and cooperation,

Atlas devoted hundreds of hours of research to collect data for the creation of a private placement memorandum which would provide relevant financial and investment information to potential investors. On or about October 30, 1996, Atlas completed the private placement memorandum, which included a detailed discussion of Dataflux and its subsidiaries, the offering of its securities, the dividend policy, capitalization, Dataflux's financial condition, financial projections, investment considerations, the company's facilities, business strategy, as well as other related information. When the private placement memorandum was completed, Atlas took Dataflux to the international capital market.

11. Throughout November and December 1996, and January 1997, Atlas worked diligently and aggressively to introduce Dataflux to potential investors. By January 28, 1997, Atlas had contacted more than 80 potential investors to promote Dataflux's private equity placement, including:

> Soros Group, Tiger Group, Harvard Management Company, Inc., Fenway Partners, Calpers, The Sprout Capital Group, Biltmore Emerging Markets, Lazard Emerging Markets, Govett Emerging Markets, Lexington Worldwide EM, T. Rowe Price EM Stock, Martin Currie, Strome Sussking Investment Management, L.P., First Reserve, HSBC Asset Management, Montgomery Asset Management, Salomon Brothers, Willis, Stein & Partners, Janus, Schooner Asset Management Co., WestSphere Capital Associates, Brandes Investment Partners,

L.P., Bessemer Trust, KIO, Scottish Equitable, Banesto, Fenway Partners, Inc.; Mercury Asset Management; Hicks, Furst Muse & Tate; Legal & General; Murray Johnstone; Schroeders; ABN Amro; Bank Scandina; Gartmore; Edinburg Fund Managers; Citibank; Clariden; Hermes; Kleinworth Benson; NM Rothchild; Robert Fleming; Standard Life; Stewart Life; Stewart Ivory; Investment Bank of Ireland; State of Wisconsin Board of Investors; Trust Company of the West/Latin America; Mercator; Interfunds, Inc.; Patricof & Co. Ventures, Inc.; Castile Capital Corp.; Bank of America; GT Capital Management; Fidelity Investments; Alliance Capital; IDS; Founders; Goldman Sachs; Nomura Capital Management; Merrill Lynch Asset Management; Kingdon Capital; Putnam Investments; Northern Trust; Northwestern Mutual; RCM Capital; Roney Capital Partners; Rothchild Emerging Markets; Scudder; Templeton; Tennenbaum & Co.; Strong Capital Management; Nicholas Applegate; Bank of New York; Texas Pacific Group (Newbridge Latin America); Darby Overseas Investments, Ltd.; Bastion Capital Corporation; Farallon Capital Management, Inc.; Electra Inc.; JP Morgan; Deltec Asset Management Corporation; Moore Capital; Morgan Stanley Asset Management; and Merrill Lynch Private Equity Group.

12. Throughout this period, Atlas continually provided financial advice and guidance to Dataflux. Atlas specifically

provided Dataflux needed critical feedback Atlas had received from its numerous meetings and negotiations with potential investors in the marketplace regarding Dataflux's potential placement/sale of securities.

13. By the end of January 1997, three investors were seriously interested in Dataflux. By January 31, 1997, Dataflux rejected one of the potential investors. During January and February 1997, Atlas continued aggressive negotiations with potential investor DLJ regarding its interest in Dataflux's securities. In February, DLJ visited Dataflux's office in Mexico. On or about February 28, 1997, Atlas communicated DLJ's proposal to Dataflux. To Atlas's surprise, Dataflux rejected this reasonable offer on or about March 3, 1997. On or about the same day, Dataflux notified Atlas that although Dataflux was enormously satisfied with Atlas's services, Dataflux was going to seek another alternative for placement of its securities.

14. In truth of fact, Dataflux had been surreptitiously negotiating with some third parties (*i.e.*, behind Atlas's back) for several months. Despite the existence of the exclusive agency agreement with Atlas, Dataflux did not inform or include Atlas in certain negotiations regarding the placement of Dataflux's securities as required by their agreement, which explicitly named Atlas as Dataflux's *exclusive* financial advisor and securities placement agent. Dataflux did not cooperate and assist Atlas in the process of seeking, evaluating, and completing a placement of Dataflux's securities.

15. Notwithstanding Atlas's diligence, hard work or the existence of a fair and reasonable offer from a private investor, Dataflux had redirected its interests and desired to take the company public, instead of concentrating on and cooperating in the private placing its securities contrary to the advice of Atlas. Dataflux even encouraged Atlas to expend time and money to get an offer from DLJ, while simultaneously, Dataflux clandestinely focused on taking the company public with another investment bank.

16. Dataflux's "use them and lose them" way of doing business became more pronounced when Dataflux went public in Mexico by taking advantage of all of the work performed by Atlas during the last nine months. In July 1997, the initial public offering of Dataflux stock was held. Dataflux used the private placement memorandum prepared by Atlas as a model for the disclosure document used in connection with Dataflux's public offering in Mexico without the knowledge, authority, or permission or Atlas.

17. Dataflux simply attempted to eliminate Atlas from the picture. Atlas, however, is at a minimum entitled to compensation from Dataflux pursuant to the Termination Clause of their agreement:

> If at any time prior to one year after the termination of this Agreement a Transaction is consummated with a party with whom or which Atlas communicated regarding a potential Transaction during the term of this Agreement, Atlas will be entitled to payment in full of the compensation described above. Promptly

> following any termination of this Agreement, Atlas will provide the Company with written notice of the parties with whom or which Atlas communicated regarding a Transaction during the period of our engagement.

In accordance with the Termination Clause, Atlas provided Dataflux with written notice of the parties with whom or which Atlas had communicated regarding the potential placement of Dataflux's securities:

> Abbey Life; ABN Amro; Advent International Corp.; Alliance Capital; Austin Ventures; BancBoston Capital, Inc.; Banco BBA Creditansatalt, S.A.; Banesto; Bank of America; Bank of New York; Bank Scandinave; Bankers Trust Co.; Bassini, Playfair & Associates, LLC; Bation Capital Corp.; BEA Associates; Bear, Stearns & Co.; Bechtel Enterprises, Inc., Benedetto, Gartland & Greene; Bessemer Trust; Biltmore Emerging Markets; Blackstone Group; Brandes Investment Partners, L.P.; Brinson Partners, Inc.; CALPERS; Casa de Bolsa Bancomer; Castile Capital Corp.; Chase Capital Partners (Mex-Capital); Citibank; Clariden; Clerical Medical; Credit Lyonnis Securities; Darby Overseas Investments, Ltd.; Deltec Asset Management, Corp.; Donaldson, Lufkin, Jenrette; Dunieden; DWS; Edinburgh Fund Managers; Elektra Fleming, Inc.; Farallon Capital Management, Inc.; Fenway Partners, Inc.; Fidelity Investments; First Madison Securities; First

Reserve; First Union Capital Partners; Foreign & Colonial; Founders; G.E. Capital Corp./Equity Capital Group; Gartmore; General Motors Pension Fund; Genesis; Global Emerging Markets of America; Goldman, Sachs & Co.; Govett Emerging Markets; GT Capital Management; Hambrecht & Quist; Harvard Management Company, Inc.; Hermes; Hicks, Muse, Tate & Furst, Inc.; HSBC Asset Management; IDS; Interfunds, Inc.; Investment Bank of Ireland; Ivory & Sime; Janus; JP Morgan Capital Corp.; Kingdon Capital; KIO; Kleinwort Benson; Latin America Enterprise Fund, L.P.; Lazard; Lazard Freres Asset Management; Legal & General; Lexington Worldwide EM; Liberty Mutual Insurance Co.; Lombard Odier; Martin Currie; Mercator; Mercury Asset Management; Merrill Lynch & Co.; Merrill Lynch Asset Management; Merrill Lynch Private Equity Group; Montgomery Asset Management; Moore Capital; Morgan Grenfell; Morgan Stanley & Co.; Morgan Stanley Asset Management; Murray Johnstone; NM Rothchild; Nomura Capital Management; Northern Trust; Northwestern Mutual; Oppenheimer & Co.; Paine Webber, Inc.; Paribas; Patricof & Co. Ventures, Inc.; PIMCO Equity; Pioneer Emerging Markets; Prudential Securities; Putnam Investments; RCM Capital; Robeco; Robert Fleming; Roney Capital Partners; Rothchild EM; Rowe Price Fleming; Salomon Brothers; Santander Investment Securities; SBC; Schooner Asset Management; Schroeders; Scottish Equitable; Scottish Widows;

Scudder, Stevens & Clark, Inc.; Select Capital; Smith Barney; Soros Group; Standard Life; State of Wisconsin Board of Investors; Stewart Ivory; Strome Susskind Investment Management, L.P., Strong Capital Management; T. Rowe Price; TCW/Latin American Partners, LLC; Teachers Insurance and Annuity; Templeton; Tennenbaum & Co.; Texas Pacific Group, Inc. (Newbridge Latin America); The Common Fund; The Sprout Captial Group; Threadneedle Investment Managers, Ltd.; Tiger Group; UBS; Vanguard; Westsphere Capital Associates; Wexford Management, L.P.; Willis, Stein & Partners; and Zemi Investments.

Because the initial public offering of Dataflux's stock occurred within one year after the termination of the Atlas/ Dataflux agreement and the transaction involved Santander Investment Securities, one of the companies listed by Atlas in the written notice, Dataflux owes Atlas payment in full of the 3.8 percent commission. In spite of Atlas's compliance with this provision, Dataflux has refused to compensate Atlas pursuant to the Termination Clause.

18. Additionally, Dataflux is required to compensate Atlas for its work pursuant to the Good Faith Negotiation Clause:

> **Good Faith Negotiation.** It is understood that if the Company completes a transaction in lieu of any Transaction for which Atlas is entitled to compensation pursuant to this Agreement

(including, but not limited to, the sale, merger, consolidation or any other business combination, in one or a series of transactions, involving all or a substantial amount of the business, securities, or assets of the Company, a recapitalization, or a partial or complete liquidation), Atlas and the Company will in good faith mutually agree upon acceptable compensation for Atlas taking into account, among other things, the results obtained and the custom and practice of investment bankers acting in similar transactions.

See Exhibit A, at page 8.

Notwithstanding Atlas's attempts to contact Dataflux to discuss a mutually agreeable compensation for Atlas, Dataflux has not responded.

19. Dataflux failed and refused to pay the compensation and expenses due, and continues to fail and refuse to pay the compensation and expenses due under the agreement. Thus, Atlas has been forced to file this lawsuit in order to obtain the compensation to which it is rightfully entitled.

IV.

FIRST CLAIM FOR RELIEF

Breach of Contract

20. Atlas realleges and incorporates each and every allegation of paragraphs 1 through 18 herein.

21. Atlas performed its obligations under the agreement required to be performed on its part.

22. Dataflux breached the Cooperation by the Company clause through its failure to use its reasonable best efforts to fully cooperate and assist Atlas in the process of seeking, evaluating, and completing Transactions.

23. Dataflux breached the Exclusivity Clause of the agreement by initiating discussions regarding a placement or sale of securities without informing or involving Atlas and/or by failing to promptly advise Atlas of third-party dealings regarding the placement or sale of Dataflux's securities.

24. Dataflux breached the Cash Compensation Clause by failing to pay Atlas 3.8 percent of the consideration Dataflux received for its initial public offering.

25. Dataflux breached the Good Faith Negotiation Clause by failing to compensate Atlas under such clause.

26. As a direct and proximate result of the breaches of the agreement by Dataflux, as set forth above, Atlas has sustained damages in the amount of not less than $1,348,000 with prejudgment interest thereon at the legal rate. In addition, Atlas is entitled to recover its reasonable attorneys' fees pursuant to Texas Civil Practice and Remedies Code §§38.001 *et. seq.*

SECOND CLAIM FOR RELIEF (ALTERNATIVE)

Quantum Meruit

27. Atlas realleges and incorporates each and every allegation of paragraphs 1 through 25 herein.

28. In the alternative, Atlas would show the Court that on the instance and at the request of Dataflux, Atlas provided financial services and advice and created a private placement memorandum for Dataflux. Dataflux accepted the benefit of services provided by Atlas, yet has refused to pay for such benefits. Atlas would show that an action in *quantum meruit* lies against said Defendant for the reasonable value of financial services in the amount of not less than $1,348,000.

WHEREFORE, ATLAS prays for judgment against Dataflux as follows:

1. On the first claim for relief (breach of contract), compensation, expenses, and costs due under the contract according to proof and in any event not less than $1,348,000;

2. On the second claim for relief (quantum meruit), compensation, expenses, and costs to fairly and adequately compensate Atlas for the services provided to Dataflux, and this amount should not be less than $1,348,000.

3. On each claim for relief, for general and special damages as proved at trial;

4. On all claims for relief, for prejudgment interest thereon, post judgment interest thereon, and all costs of suit;

5. For its reasonable attorneys fees as allowed by law; and

6. For such other and further relief as the Court may deem just and proper and any other relief to which it is entitled.

Appendix F

V. JURY DEMAND

Plaintiff hereby requests a trial by jury on all issues.

Respectfully submitted,

By: s/ Roger B. Greenberg
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ATTORNEYS FOR PLAINTIFF

Appendix F

EXHIBIT B

Dated _____ Copy No. _____

CONFIDENTIAL
PRIVATE PLACEMENT MEMORANDUM

US$35,000,000

DATAFLUX, S.A. de C.V.

Maximum of 4,315,660 Shares of Series "L" (Limited Voting)

(Par Value Ps 1.00)

Price: US $8.11 per share

This Confidential Private Placement Memorandum (the "Memorandum") describes the offering for sale of stock in Dataflux, S.A. de C.V. (the "Company" or "Dataflux"), established under the laws of the United Mexican States ("Mexico"). The Company will offer up to 4,315,660 shares of its Series "L" (Limited Voting) Stock ("Series "L" Shares" or "Series "L" Stock") at a price of $8.11 per share. Dataflux is a holding company located at Carretera Nacional Km. 2.71. Colonia La Estanzuela, Monterrey, Nuevo León, Mexico, which through its operating subsidiaries, is engaged in the distribution of brand name microcomputer related hardware and software products to resellers and retailers throughout Mexico. The Series "L" Stock offered hereby has limited voting rights. See "*DESCRIPTION OF CAPITAL STOCK - Voting Rights.*"

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NEITHER THESE SECURITIES NOR THIS MEMORANDUM HAVE BEEN REVIEWED, APPROVED OR DISAPPROVED BY THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION OR ANY STATE SECURITIES COMMISSION OR SIMILAR AGENCY NOR HAS ANY SUCH AGENCY PASSED UPON THE ACCURACY OR ADEQUACY OF THIS MEMORANDUM OR THE INFORMATION CONTAINED HEREIN. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

INVESTMENT IN THESE SECURITIES IS SPECULATIVE AND INVOLVES A HIGH DEGREE OF FINANCIAL RISK. THE SECURITIES SHOULD NOT BE PURCHASED BY INVESTORS WHO CANNOT AFFORD TO LOSE THEIR INVESTMENT. SEE "RISK FACTORS."

CERTAIN SIGNIFICANT RISKS INCLUDE: • EFFECTS OF EXCHANGE RATE FLUCTUATIONS, • ECONOMIC, POLITICAL AND SOCIAL CONDITIONS IN MEXICO • HOLDING COMPANY STRUCTURE • INABILITY TO TRANSFER SHARES • NO PUBLIC MARKET FOR SHARES • IMMEDIATE SUBSTANTIAL BOOK VALUE DILUTION • COMPETITION. SEE "RISK FACTORS."

THE SECURITIES DESCRIBED HEREIN ARE BEING OFFERED ON A BEST-EFFORTS BASIS. MINIMUM OF 3,082,614 SHARES OF LIMITED VOTING COMMON STOCK (US$25,000,000) AND A MAXIMUM OF 4,315,660 SHARES OF LIMITED VOTING STOCK (US$35,000,000). THE OFFERING PERIOD WILL TERMINATE ON DECEMBER 31, 1996, UNLESS EXTENDED BY THE COMPANY UP TO 90 DAYS.

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	Price to Investor		Total Offering	
	Minimum	Maximum	Minimum	Maximum
Price Per Share	US $8.11	US $8.11	US $25,000,000.00	US $35,000,000.00
Commission	US $.308	US $.308	US $950,000.00	US $1,330,000.00
Proceeds to Company	US $25,000,000.00	US $35,000,000.00	US $24,050,000.00	US $33,670,000.00

Appendix F

Atlas Global Group, L.P.
5847 San Felipe, Suite 4540
Houston, Texas 77057
(713) 780-9570

The date of this Private Placement Memorandum
is October 30, 1996.

Appendix F

EXHIBIT C

LITIGATION RESOURCES

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. 97-3779

JURY TRIAL DEMANDED

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

VS.

GRUPO DATAFLUX,

Defendant.

ORAL DEPOSITION OF

OSCAR ROBLES

January 11, 2000

* * *

Appendix F

[5] **OSCAR ROBLES,**

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. ROBERTSON:

Q. Would you please state your full name?

A. Oscar Orson Robles Canon.

Q. And should I call you Mr. Robles; is that right?

A. Robles, as you wish.

Q. Okay. Who do you work for?

A. I work for Atlas Global.

Q. And what is Atlas Global? Is it Atlas Global Group?

A. Atlas Global Group.

Q. What is Atlas Global Group?

A. Atlas Global is a U.S. based investment bank.

Q. Is it a corporation, a partnership? What is it?

A. It's a limited partnership.

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Q. Who is the general partner of the limited partnership or — general or partner or partners?

A. I think it's Bahia Management.

Q. Can you spell that?

A. Bahia, B-A-H-I-A, Management.

Q. Is that a corporate entity?

[6] A. I think so. I think it's a corporation. Probably a limited liability corporation.

Q. How many partners are in the limited partnership of Atlas Global Group?

A. There are three partners.

Q. Who are the partners?

A. Oscar Robles, myself; Francisco Llamosa and Heptagon Financial.

Q. I'm sorry, is it — how did you say it, Bahia?

A. Bahia Management.

Q. Bahia. Who owns Bahia Management?

A. That's a corporation owned by Francisco Llamosa and myself.

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Q. Previously there was an entity called Atlas Global Group, LP. Do you know the difference between Atlas Financial Group and Atlas Global Group?

A. It's the same entity.

Q. Same entity. Just a name change?

A. Yeah.

Q. Same partners?

A. (Nods head.)

Q. Is that a "yes"?

A. Yes.

Q. You say the Atlas Global Group is an investment bank. What does an investment bank do in general

* * * *

[13] did you work with investment bankers?

A. No.

Q. While in either position with Cemex, were you involved in any kind of a public offering or a private placement of securities?

A. No.

Appendix F

Q. Prior to the time that you worked for Cemex, what did you do? What job did you have prior to Cemex?

A. Prior to Cemex I was in charge of strategic planning, I was the strategic planning director for the chemical division — chemical and plastics division of Grupo Cydsa.

Q. I'm sorry, when you were director of U.S. operations for Cemex, where did you live?

A. In Monterrey.

Q. And you did that job from Monterrey?

A. I had to commute a lot. We used to have an office here in Houston and I used to travel a lot to Houston, Phoenix, California.

Q. In your position as strategic planning director for the chemicals and plastic division at Grupo Cydsa, what did you do?

A. I was preparing and overviewing the execution of the business plan for all the companies within that division.

* * * *

Appendix F

SIGNATURE OF WITNESS

I, OSCAR ROBLES, solemnly swear or affirm under the pains and penalties of perjury that the foregoing pages contain a true and correct transcript of the testimony given by me at the time and place stated with the corrections, if any, and the reasons therefor noted on the foregoing correction page(s), and that I am signing this before a Notary Public.

s/ Oscar Robles
OSCAR ROBLES

STATE OF T E X A S

COUNTY OF HARRIS

SUBSCRIBED AND SWORN TO BEFORE ME BY OSCAR ROBLES on this, the 17th day of February, 2000.

Appendix F

EXHIBIT D

LITIGATION RESOURCES

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

VS.

GRUPO DATAFLUX,

Defendant.

ORAL DEPOSITION OF

ANTONIO MARZIALE

February 21, 2000

* * *

Appendix F

ANTONIO MARZIALE,

[4] having been first duly sworn, testified as follows:

EXAMINATION

BY MR. ROBERTSON:

Q. Would you please state your full name?

A. Antonio Marziale, M-A-R-Z-I-A-L-E.

Q. Mr. Marziale, who do you work for?

A. Heptagon Capital Management.

Q. And what is your title at Heptagon Capital Management?

A. President.

Q. What does Heptagon Capital Management do?

A. It's involved in asset management mostly.

Q. And what is asset management?

A. We invest or study opportunity for investments and also are involved in money management.

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Q. What would money management mean, is that what you said, money management?

A. Money manager..

Q. What is that?

A. Investing on behalf of clients in bonds, stocks and, you know, financial instruments.

Q. Are your clients for money management, are they individuals or are they businesses?

A. They are a mixture of both.

* * *

[8] Q. (BY MR. ROBERTSON) Prior to the time you worked at Paribas Bank, were you a full-time student?

A. Yes.

Q. Is Heptagon Capital Management a partner in Atlas?

A. No.

Q. Is there a Heptagon entity that is the — a partner in Atlas?

A. Yes, a parent company, Heptagon Investments.

Appendix F

Q. What is your relationship, if any, with Heptagon Investments?

A. I'm a managing director.

Q. When you say a managing director, what does that — is that something different than a director?

A. Yes. A director is considered an advisor to the company manager and the managing director attends to the affairs of the business.

Q. What do you do as a managing director in general terms for Heptagon Investments?

A. Source deals and get involved in the management of Heptagon Investments's participations.

Q. What does Heptagon Investments do?

A. It's a — if I can classify it this way, it's a mini merchant banking firm. It's a boutique merchant banking firm.

[9] Q. And can you give a brief description for the jury about what a merchant bank does?

A. Merchant bank is a company that invests its own capital in opportunities that it sources or that are being presented to itself.

Appendix F

Q. Now, how is that different than what Heptagon Capital does?

A. Well, Heptagon Capital is a subsidiary of Heptagon Investments so there is some interlapping in the activities; but Heptagon Capital Management was — it's a U.S. subsidiary that is a SCC registered; whereas, the Heptagon Investments is an offshore group.

Q. When Heptagon Capital invests, is it their own money —

A. No.

Q. — its clients money or Heptagon Investments' money?

A. It can either be a client's money, if it has a relationship with the client or most of the time it's Heptagon Investments' money.

Q. What is your relationship, if any, with Atlas?

A. My relationship with Atlas is to the investment of Heptagon Investments as mainly Atlas.

Q. And what kind of investments has Heptagon Investments made in Atlas?

* * * *

Appendix F

SIGNATURE OF WITNESS

I, ANTONIO MARZIALE, solemnly swear or affirm under the pains and penalties of perjury that the foregoing pages contain a true and correct transcript of the testimony given by me at the time and place stated with the corrections, if any, and the reasons therefor noted on the foregoing correction page(s), and that I am signing this before a Notary Public.

s/ Antonio Marziale
ANTONIO MARZIALE

APPENDIX G — PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION FILED NOVEMBER 22, 2000

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

vs.

GRUPO DATAFLUX,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Atlas Global Group, L.P. files this its Response to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and in support thereof would respectfully show the Court as follows:

I.

INTRODUCTION

1. On November 18, 1997, Plaintiff Atlas Global Group, L.P., (hereinafter "Atlas") sued Defendant Dataflux (hereinafter "Dataflux"). On November 8, 2000, **almost four years later *and* after a week-long trial *and* after jury verdict in Atlas's favor**, Dataflux has filed a motion to challenge this Court's jurisdiction. Dataflux did not challenge this Court's diversity jurisdiction prior to these events, despite the fact that Dataflux has known all the information contained in its motion for years.[1] Thus, Dataflux's motion appears to be nothing more than a dilatory last-ditch effort to prevent a judgment from being entered against Dataflux. As set forth herein, Dataflux's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss") must be denied.

II.

RELEVANT PROCEDURAL BACKGROUND

2. Plaintiff Atlas was and is a limited partnership based in Houston, Texas, that specializes in financial advice and consultation and equity placement. *See* **Exhibit A**, Affidavit of Antonio Marziale (hereinafter "Marziale"). Defendant Dataflux is a company based in Monterrey, Mexico. Diversity jurisdiction was invoked based upon the fact that Atlas, a

1. In fact, on October 3, 2000, Dataflux signed the Consent to Proceed Before a Magistrate, consenting to transfer the case to United States Magistrate Judge Frances Stacy, and agreeing that Judge Stacy conduct all further proceedings, including final judgment.

Houston-based limited partnership, sued Dataflux, an alien. *See* **28 U.S.C. § 1332(a)(2)**.

3. Dataflux now contends that because two of Atlas's limited partners are aliens complete diversity does not exists. Dataflux contends that Oscar Robles ("Robles"), a former limited partner of Dataflux, is a citizen of Mexico and Heptagon Investments is a British Virgin Islands company. Atlas admits that Robles is a citizen of Mexico, but "Heptagon Investments" is not a partner of Atlas. Rather, the "Heptagon"-related partner of Atlas is HIL Financial Holdings, L.P., a Texas limited partnership, and not an alien as Dataflux contends. *See* **Exhibit A**.

4. In 1996, the Atlas partnership was composed of the following entities: (1) Bahia Management, L.L.C., a Texas limited liability company, was the managing general partner; (2) Capital Financial Partner, Inc., a Delaware corporation, was a general partner; (3) HIL Financial Holdings, L.P., a Texas limited partnership, was a limited partner; (4) Francisco Llamosa ("Llamosa"), a Mexican citizen, was a limited partner; and (5) Robles, a Mexican citizen, was a limited partner. *See* **Exhibit A**, Affidavit of Marziale.

5. Dataflux's motion presupposes that Robles and "Heptagon Investments" are aliens which divest this Court of jurisdiction. Dataflux, however, mistakenly avers that Robles and "Heptagon Investments" are the two aliens that have allegedly divested this Court of diversity jurisdiction. In fact, however, the only two aliens that Dataflux could possibly have complained of are Robles and Llamosa. Secondly, Dataflux's motion presupposes that the citizenship

of these third party defendants is to be considered in assessing diversity jurisdiction. Atlas disputes that the citizenship of these two individuals affects jurisdiction. Even assuming, ***arguendo***, however, that Llamosa and Robles' citizenship was considered in assessing diversity, they are no longer limited partners in Atlas. On or about April 1, 2000, the partnership of Atlas changed. Robles and Llamosa are no longer partners of Atlas. ***Id.*** At this time, the limited partners of Atlas are: (1) HIL Financial Holdings, L.P., a Texas limited partnership,[2] and (2) Capital Financial Partner, Inc., a Delaware corporation. ***Id.*** Finally, Dataflux's motion presupposes that the former limited partners are necessary plaintiffs to this action. Dataflux, however, has never objected or moved this Court to join them as plaintiffs. Diversity jurisdiction is therefore proper and Defendant's Motion to Dismiss should be denied as set forth herein.

III.

ARGUMENT AND AUTHORITIES

6. Dataflux argues that satisfaction of diversity jurisdiction for a partnership includes an examination of the citizenship of its limited partners as well as its general partners. *See* ***Carden v. Arkoma Assoc.***, 494 U.S. 185, 187-196, 110 S. Ct. 1015, 1016-21, 108 L. Ed.2d 157 (1990). Atlas does not dispute this general legal principle. In the instant case, however, Robles and Llamosa as limited partners did not file this lawsuit: Atlas, the limited partnership itself, filed this suit. As shown in Section III, Robles and Llamosa

2. The sole partner of HIL Financial Holdings is OVH, Inc., a Texas corporation.

as limited partners, could not have filed this suit in the absence of certain circumstances, none of which exists in this case. Moreover, Dataflux added Llamosa and Robles as additional parties to Dataflux's counterclaim, and as such, their citizenship is irrelevant to the jurisdictional analysis of the Plaintiff. Finally, even assuming, ***arguendo***, that Llamosa's and Robles' citizenship was to be considered, diversity jurisdiction can and should be preserved by dismissing them in their capacity as unnamed former limited partner plaintiffs, to the extent these two individuals could have ever even been considered Plaintiffs.

Llamosa and Robles Were Never Plaintiffs In This Lawsuit

7. Atlas sued Dataflux on November 18, 1997, but Dataflux did not file its counterclaim against Atlas until November 30, 1998. *See* **Exhibit B**, Defendant's Original Answer and Counterclaim. On December 9, 1998, Dataflux filed a Motion for Leave to Add Counterdefendants. *See* **Exhibit C**, Counterplaintiff's Motion for Leave to Add Counterdefendants. In this Motion, Dataflux asked the Court for leave to add Llamosa and Robles as parties to Dataflux's counterclaim. The Court granted this motion on January 7, 1999. *See* **Exhibit D**, Order of January 7, 1999. Dataflux thereafter served Llamosa and Robles individually with Dataflux's counterclaim. Until now, Dataflux has never maintained that Llamosa and Robles are plaintiffs in this lawsuit. *See* **Exhibit E**, Defendant's First Amended Counterclaim. Simply put, if Robles and Llamosa had been plaintiffs, then Dataflux would not have had to ask this Court for leave to add them as additional parties to the counterclaim.

Thus, as the record in this case demonstrates, Llamosa and Robles were adverse to the Defendant's counterclaim as additional parties. Thus, their citizenship have no bearing on the authority of the federal court to adjudicate the diversity claims Atlas asserted against Dataflux.[3]

8. Desp te the fact that Dataflux added Robles (and Llamosa) as additional parties to the lawsuit, Dataflux now claims that Robles is actually a plaintiff to this lawsuit whose citizenship must be considered for jurisdictional purposes. To support its theory, Dataflux cites a Second Circuit case, ***Franceskin v. Credit Suisse***,[4] for the proposition that "no diversity jurisdiction existed between an Argentinian plaintiff and Swiss defendant because federal courts lack subject matter jurisdiction over state law claims among aliens."

3. *See* ***Caterpillar Inc. v. Lewis***, 519 U.S. 61, 66-67 n.1, 117 S. Ct. 467, 476, 136 L. Ed. 2d 437 (1996) (citing ***Wichita Railroad & Light Co. v. Public Util. Common of Kan.***, 260 U.S. 48, 54, 43, S. Ct. 51, 53, 67 L. Ed. 124 (1922) (federal jurisdiction once acquired on the ground of complete diversity of citizenship which is unaffected by the subsequent intervention "of a party whose presence is not essential to a decision of the controversy between the original parties."). As elaborated in 3 J. Moore, Moore's Federal Practice ¶ 14.26, p. 14-116 (2d ed. 1996) (footnotes omitted): "Once federal subject matter jurisdiction is established over the underlying case between [plaintiff] wife and [defendant], the jurisdictional propriety of each additional claim is to be assessed individually. Thus, assuming that jurisdiction is based upon diversity of citizenship between [plaintiff] and [defendant] the question concerning impleader is whether there is a jurisdictional basis for the claim by [defendant] against [third-party defendant]. The fact that [plaintiff] and [third-party defendant] may be co-citizens is completely irrelevant.

4. 214 F.3d 253, 257 (2nd Cir. 2000).

The premise that Article III judicial power does not extend to cases in which the only parties are aliens is not novel law. The instant case, however, does not involve a dispute between an alien plaintiff and an alien defendant, as in ***Franceskin***. The instant case involves citizens of different states suing an alien. Thus, the ***Franceskin*** case is distinguishable and is inapplicable to the situation at hand.

9. While Llamosa and Robles were at one time limited partners of Atlas, their limited partnerships in Atlas no longer exists. *See* **Exhibit A**. Moreover, Dataflux never contended that these two individuals were indispensable or necessary party Plaintiffs. Thus while Atlas acknowledges jurisdiction is not waiveable, Dataflux's failure to move to add Llamosa and Robles as party plaintiffs has been waived. In any event, if this Court determines that the citizenship is to be considered and to the extent this Court finds that **these two former limited partners are non-diverse, unnamed "plaintiffs," they are dispensable and diversity jurisdiction exists.**

II.

DIVERSITY JURISDICTION MUST BE MAINTAINED

10. If this Court finds that the citizenship of former partners Robles and Llamosa are to be considered for purposes of diversity jurisdiction, then Atlas respectfully requests that this Court dismiss them in their capacity as Plaintiffs.

Appendix G

To the Extent Necessary, Plaintiff Moves This Court to Dismiss Dispensable Non-Diverse Former Limited Partners

11. To wipe out diversity in this case on the eve of a judgment being entered and to dismiss a case that satisfies all federal jurisdictional requirements would impose an exorbitant cost on our court system, a cost incompatible with the fair and unprotracted administration of justice. The Supreme Court has also emphasized that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *See* ***Newman-Green, Inc. v. Alfonzo-Larrain***, 490 U.S. 826, 104 L. Ed. 2d 893, 109 S. Ct. 2218 (1989). The Supreme Court has also stated that **"once a diversity suit has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming."** *See* ***Caterpillar Inc. v. Lewis***, 519 U.S. 61, 75, 117 S. Ct. 467, 476, 136 L. Ed. 2d 437 (1996). In the instant case, where litigation has been ongoing for almost four years and the parties now await the final judgment to be entered after a week-long jury trial, the considerations of finality, efficiency, and economy are overwhelming. If necessary, this Court should save diversity jurisdiction by dismissing Robles and Llamosa (at least, in their capacity as former limited partners Plaintiffs) and by retaining them in this suit only in their capacity as additional parties to Dataflux's counterclaim. The United States Supreme Court has held that a court has the power to dismiss a dispensable nondiverse party from a suit under Rule 21 of the Federal Rules of Civil Procedure in order to salvage jurisdiction. ***Id.*** at 832-33 (extending Rule 21 of the Federal Rules of Civil Procedure to appellate courts).

Appendix G

Rule 21 Empowers the Court to Dismiss Robles and Llamosa If They Are Plaintiffs

12. A court may dismiss a party from a suit under Federal Rule of Civil Procedure 21. *See* **FED. R. CIV. P.** 21 ("Parties may be dropped or added by order of the court on motion of any party or *of its own initiative* at any stage of the action and on such terms as are just."). A court may also dismiss a dispensable non-diverse party in order to salvage its diversity jurisdiction. *See* **FED. R. CIV. P.** 19. In making its determination, the Court must carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation." ***Newman-Green***, 490 U.S. at 838. Moreover, whether a party is "'indispensable, that is whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation." ***Provident Tradesmens Bank & Trust Co. v. Patterson***, 390 U.S. 102, 118, 88 S. Ct. 733, 742, 19 L. Ed. 2d 936 (1968). In other words, "the effect on the parties and on the litigation process is to be the fulcrum of [the] decision." ***Broussard v. Columbia Gulf Transmission Co.***, 398 F.2d 885, 888 (5th Cir. 1968) ("Rule 19 is designed to ameliorate the catechistic distinction between 'necessary' and 'indispensable' parties, which had sometimes subordinated logic and reality to historical encrustations. Pragmaticals are to be the solvents of joinder problems, replacing former rigid terminological descriptions of the parties.").

13. Rule 19 of the Federal Rules of Civil Procedure provides in part:

> A person who is subject to service of process and whose joinder will not deprive the court of

> jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations . . .

FED. R. CIV. P. 19.

Rule 19 allows joinder of necessary parties unless that joinder would defeat diversity jurisdiction. When jurisdiction is threatened, the Court must then determine whether the potentially joined party is in fact indispensable, meaning the action cannot proceed without such party. *See **Clark v. Kick***, 79 F.Supp.2d 747, 753 (S.D. Tex. 2000). Rule 19 lists four factors to consider when deciding whether a party is indispensable: (1) prejudice to the absent party or to those involved in the lawsuit; (2) whether relief can be shaped to lessen the prejudice to existing parties; (3) whether relief can be given without the absent party; and (4) whether the plaintiff has another forum in which to prosecute the action if it is dismissed. ***Id.*** In the instant case, the facts establish that Robles and Llamosa are not indispensable plaintiffs. First, no prejudice to Dataflux would be caused by Llamosa and Robles' presence in the lawsuit in their capacities as additional parties to the counterclaim.

Robles and Llamosa Could Not Have Even Filed This Suit

14. Because Robles and Llamosa were only limited partners in the Atlas partnership, their ability to file suit to recover a judgment in favor of Atlas was severely limited by the Texas Revised Limited Partnership Act. Thus, relief to Atlas could be provided without Robles and Llamosa as plaintiffs. Section 10.01 of the Texas Revised Limited Partnership Act provides that limited partners may bring an action to recover a judgment in the limited partner's favor only under certain defined circumstances, none of which exists in the instant case:

> Sec. 10.01. A limited partner may bring an action in a court of competent jurisdiction in the right of the limited partnership to recover a judgment in the limited partnership's favor **if all general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.**

TEX. REV. CIV. STAT. ANN., art. 6132a-1, § 10.01 (West Supp. 2000).

In the instant case, no general partners refused to bring the instant action. Thus, in their capacity as limited partners, Robles and Llamosa were even not authorized to file suit on behalf of Atlas. It is axiomatic that Robles and Llamosa were not, therefore, necessary party plaintiffs in the instant action.

15. This Court has held that under certain circumstances, the citizenship of limited partners can be disregarded for diversity purposes. *See* ***Mallia v. PaineWebber, Inc.***, 889 F. Supp. 277, 283 (S.D. Tex. 1995) (holding that the partnerships were nominal parties and that, although they were residents of Texas under ***Carden***, the Court was not divested of diversity jurisdiction and their citizenship should be ignored for diversity purposes). This, likewise, is certainly a case where the citizenship of two former limited partners should be disregarded for diversity purposes. Llamosa and Robles are already additional third parties and finally, these non-diverse parties are not indispensable to Atlas's recovery.

16. Although a full citation was not provided, Dataflux cites to a second case in its motion. Atlas assumes that Dataflux was citing ***Giannakos v. M/V Bravo Trader***, 762 F.2d 1295 (5th Cir. 1985). ***Giannakos*** does hold that diversity does not exist where aliens are on both sides of the litigation. ***Id.*** at 1298. However, the issue of whether the non-diverse party was an indispensable party was not addressed in that case. ***Id***. at 1298-99.

CONCLUSION

17. As the Supreme Court commented in ***Newman-Green***, nothing but a waste of time and resources would be engendered by dismissing this case and by forcing these parties to begin anew. This cannot be more true in the instant case, where Atlas had to serve Dataflux via the Inter-American Convention on Letters Rogatory and its Additional Protocol - a process took many months to complete and the parties have completed a week-long jury trial. Dataflux's last

minute motion must be seen for what it really is: yet another hurdle to prevent Atlas from recovering against Dataflux. This case is in a post-trial posture. No valid reason exists at this belated juncture to provide Dataflux with a windfall escape from the jury's adverse findings at trial.

PRAYER

WHEREFORE, PREMISES CONSIDERED Atlas Global Group, L.P. prays that this Court deny Defendant Dataflux's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for such other and further relief, both general and special, at law or in equity, to which Plaintiff may show itself justly entitled to receive.

Respectfully submitted,

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Appendix G

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Appendix G

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

vs.

GRUPO DATAFLUX,

Defendant.

AFFIDAVIT OF ANTONIO MARZIALE

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, personally appeared Antonio Marziale, who, being by me first duly sworn, deposed as follows:

> "My name is Antonio Marziale. I am over the age of 18 years and have never been convicted of a felony. I am competent, qualified, and authorized to make this affidavit. I have personal knowledge of the matters stated herein, and all such matters

are true and correct. I am acquainted with the facts herein based upon my affiliation as president of Capital Financial Partner, Inc., the managing partner of Atlas Global Group, L.P. ("Atlas").

Plaintiff Atlas is a limited partnership based in Houston, Texas that specializes in financial advice and consultation and equity placement. In 1996, the Atlas partnership was composed of the following entities: (1) Bahia Management, L.L.C., a Texas limited liability company, was the managing general partner; (2) Capital Financial Partner, Inc., a Delaware corporation, was a general partner; (3) HIL Financial Holdings, L.P., a Texas limited partnership, was a limited partner; (4) Francisco Llamosa, a Mexican citizen, was a limited partner; and (5) Oscar Robles, a Mexican citizen, was a limited partner.

On or about April 1, 2000, however, the partners of Atlas changed. Oscar Robles and Francisco Llamosa withdrew as partners of Atlas, as did Bahia Management, L.L.C. At this time, the partners of Atlas are: (1) HIL Financial Holdings, L.P., a Texas limited partnership, and (2) Capital Financial Partner, Inc., a Delaware corporation. The partners of HIL Financial Holdings are OVH, Inc., a Texas corporation, and OFI Management, a Delaware corporation.

In 1997, when Atlas decided to file suit against Dataflux, the general partners consented to bring the instant action. None of the general partners refused to file suit against Dataflux.

Further Affiant sayeth not."

s/ Antonio Marziale
ANTONIO MARZIALE

Appendix G

EXHIBIT B

[Defendant's Original Answer and Counterclaim
Filed November 30, 1998, has been printed
as Appendix D, pp. 34a-44a]

Appendix G

EXHIBIT C

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Counterdefendant,

vs.

GRUPO DATAFLUX,

Counterplaintiff.

**COUNTERPLAINTIFF'S MOTION
FOR LEAVE TO ADD COUNTERDEFENDANTS**

Counterplaintiff Dataflux S.A. de C.V. files this Motion For Leave To Add Counterdefendants pursuant to Fed. R. Civ. P. 13(h).

I. *Background.*

On November 30, 1998, counterplaintiff filed its answer and counterclaim. Counterplaintiff is filing its First Amended Counterclaim at the same time as it files this motion ten days after it filed the original Counterclaim. The First Amended Counterclaim adds the two persons as counterdefendants who

made the misrepresentations to Dataflux on which Dataflux bases its counterclaim – Francisco Llamosa and Oscar Robles-Cañon.

II. *Rationale For This Motion.*

"Although not required by Rule 13(h), the general practice is to obtain a court order to join an additional party." Wright, Miller & Kane, FED. PRAC. & PROC., Civil 2d 1434, at 270. In an abundance of caution, counterplaintiff seeks this Court's permission before serving the two new counterdefendants. Compare *Northfield Ins. v. Bender Shipping & Repair Co.*, 122 F.R.D. 30 (S.D. Ala. 1988) (no order required to add counterdefendant) with *Mountain States Sports, Inc. v. Sharman*, 353 F. Supp. 613, 618 (D. Utah 1972) (order required before service appropriate on counterdefendant).

III. *The Addition Of New Counterdefendants Is Appropriate.*

The addition of these parties is timely, will not prejudice the interests of any party, and is necessary to the full and fair adjudication of this action. No discovery has occurred. Furthermore, the First Amended Counterclaim is being filed only ten days[1] after the original Counterclaim was filed. Moreover, no significant deadlines have passed and plenty of time remains before trial will occur for discovery. Because no

1. "'[S]ince the 1963 amendment of Rule 14 now provides that no leave of court is required to bring in new parties if the third party complaint is filed no later than ten days after service of the original answer, the same policy ought to be applicable to counterclaims filed in the answer.'" *Northfield Ins.*, 122 F.R.D. at 32, quoting 3 J. Moore, MOORE'S FED. PRAC., ¶ 13.39, ftn. 27 (2d ed. 1987).

discovery has occurred and because no deadlines have passed, the newly added counterdefendants will be on essentially the same footing as their employer or former employer Atlas – the other counterdefendant in the case. Therefore, Dataflux should be allowed to serve and add Mr. Llamosa and Mr. Robles-Cañon as counterdefendants. *See Clark v. Universal Builders, Inc.*, 501 F.2d 324, 339 (7th Cir.) (error not to allow the addition of parties late in the case (a) when no prejudice existed to defendants and (b) when the new defendants had been active participants in the case), *cert. denied*, 419 U.S. 1070 (1974).

Respectfully submitted,

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Appendix G

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-97-3779

ATLAS GLOBAL GROUP, INC.,

Plaintiff,

v.

GRUPO DATAFLUX,

Defendant.

ORDER

Before the Magistrate Judge upon referral from the District Judge is Counterplaintiff's Motion for Leave to Add Counterdefendants (Document No. 21). After having reviewed the parties arguments, the applicable law, and the procedural posture of this case, it is

ORDERED that Counterplaintiff's Motion for Leave to Add Counterdefendants (Document No. 21) is GRANTED. Counterplaintiff Grupo Dataflux shall proceed to serve Counterdefendants Francisco Lllamosa and Oscar Robles-Canon with all due haste.

Appendix G

Signed at Houston, Texas this 7th day of January, 1999.

s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

Appendix G

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

vs.

GRUPO DATAFLUX,

Defendant.

DEFENDANT'S FIRST AMENDED COUNTERCLAIM

Defendant Dataflux S.A. de C.V., sued as "Grupo Dataflux," files this its first amended counterclaim.

PARTIES

1. Counterplaintiff Dataflux S.A. de C.V. has appeared in this lawsuit.

2. Counterdefendant Atlas Global Group has appeared in this lawsuit.

3. Counterdefendant Oscar Robles-Cañon was or is an officer with Atlas Global Group. He can be served at Abasolo 827 ote., Colonia Centro, Monterrey, Nuevo León, México 64000.

Appendix G

4. Counterdefendant Francisco Llamosa is an officer with Atlas Global Group. He can be served at Atlas Global Group, 5847 San Felipe, Suite 4540, Houston, Texas 77057.

FACTS

5. In the summer of 1996, Llamosa and Robles-Cañon approached Dataflux and explained to Dataflux that Atlas — an investment bank — was available to assist Dataflux with a private placement of securities. Both Llamosa and Robles-Cañon explained that they, and the other employees of Atlas, were experienced in the private placement of securities and had a great number of contacts which would enable Atlas to successfully complete a private placement. They even identified a number of funds with which they had close contacts. Also at the meeting in Houston, Texas, Llamosa and Robles-Cañon explained in a written brochure that Dataflux would be able to raise "not less than" between $20 million and $25 million in a private placement based on a market valuation of Atlas that they estimated at between $148 million and $190 million. They then explained that they believed the market value for the private placement could be as high as $220 million. The private placement memorandum created by Atlas sought to raise between $25 million and $35 million. As a result of the representations of Llamosa and Robles-Cañon, Dataflux decided to enter into an agreement with Atlas to make a private placement offering instead of undertaking a public offering with a firm capable of raising the kind of capital Dataflux sought.

6. Even though Llamosa and Robles-Cañon claimed that Dataflux would be able to raise money in a private placement

of securities based on a market valuation of between $148 million and $220 million, Atlas now claims that the DLJ proposal in January 1997 that used a market valuation of $80 million was the reasonable amount that Dataflux should have expected from the private placement offering. In other words, Llamosa and Robles-Cañon knew that the valuation for the private placement could not be achieved and yet they represented to Dataflux that the valuation of between $148 million and $220 million could be achieved through a private placement. Furthermore, Llamosa and Robles-Cañon and Atlas did not have the connections they represented they had that would make the private placement successful. If Llamosa and Robles-Cañon would not have mislead Dataflux about the amount of capital that could be raised in a private placement and about Atlas' abilities, Dataflux would not have entered into the agreement with Atlas.

7. As a result of the misleading misrepresentations made by Llamosa and Robles-Cañon on behalf of Atlas, Dataflux was without the $29.7 million it raised through a public offering for at least six months. Further, Dataflux employees spent time and money in working with Atlas as a result of the misrepresentations. Because the counterdefendants' fraudulent and/or negligent misrepresentations caused injury to Dataflux, Dataflux files this counterclaim to recover its losses. Dataflux also seeks punitive damages for the fraud committed by the counterdefendants.

PRAYER

Dataflux prays that Atlas, Llamosa, and Robles-Cañon appear and be held liable for the damages caused by fraudulent or negligent misrepresentations made by Llamosa, Robles-Cañon and Atlas. Dataflux also seeks punitive damages for the tortious conduct of Atlas, Llamosa, and Robles-Cañon.

Respectfully submitted,

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APPENDIX H — DATAFLUX'S REPLY TO ATLAS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION FILED NOVEMBER 27, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. 97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff and Counterdefendant,

vs.

GRUPO DATAFLUX,

Defendant and Counterplaintiff.

DATAFLUX'S REPLY TO ATLAS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Dataflux S.A. de C.V. ("Dataflux") files this its Reply to Atlas' Response To Dataflux's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Appendix H

I. *Atlas Admits That The Two Mexican Limited Partners Destroys Diversity.*

Atlas admits that at least two of the limited partners in Atlas at the time this lawsuit was filed are citizens of Mexico, like Dataflux. Atlas also admits that the citizenship of each limited partner in a limited partnership that brings a lawsuit must be examined for purposes of diversity under the holding of *Carden v. Arkoma Assoc.*, 494 U.S. 185, 195 (1990) ("diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all its members.'") Plaintiff's Response at 4. Atlas likewise admits that a foreign plaintiff and a foreign defendant in the same case destroys diversity. Plaintiff's Response at 5. Further, Atlas does not dispute that a subject matter jurisdiction challenge can be raised at any time. Each of these admissions requires dismissal of this lawsuit.

II. *Subject Matter Jurisdiction Is Determined At The Time The Lawsuit Was Filed.*

Diversity jurisdiction is determined as of the time when a lawsuit is filed, even if a change in the citizenship of a party occurs during the pendency of a lawsuit that would have been sufficient to confer diversity jurisdiction if the event had occurred prior to the filing of the lawsuit. *See, e.g., Sarmiento v. Texas Bd. of Veterinary Medical Examiners*, 939 F.2d 1242, 1246 n. 6 (5th Cir. 1991) (vacating district court's judgment even though plaintiff had moved to a diverse state during the course of the lawsuit); *American Foundation, Inc. v. Mountain Lake Corp.*, 454 F.2d 200, 202

(5th Cir. 1972) (holding that a change in citizenship during the pendency of a suit cannot create diversity jurisdiction).

"[I]f diversity of citizenship did not exist when the action was commenced, it cannot be created by a later change of domicile by one of the parties or some other event." WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3608, at 458 (1984). *See also Faysound Ltd. v. United Coconut Chemicals, Inc.*, 878 F.2d 290, 296 (9th Cir. 1989) ("Subsequent events do not confer jurisdiction. . . . What happened in May 1988 could not confer jurisdiction in December 1987."); *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 776 (5th Cir. 1986) ("The citizenship of a party at the *commencement* of the action is controlling for purposes of determining diversity jurisdiction and subsequent actions do not affect the court's jurisdiction. . . . Jurisdiction cannot be created retroactively by substituting a diverse claimant for a nondiverse party."); *Scott v. Communications Services, Inc.*, 762 F. Supp. 147, 151 (S.D. Tex. 1991) ("The change of a party's citizenship after commencement does not affect this court's diversity jurisdiction. . . . If MLD, instead of merging with CSI, had reincorporated itself in New Jersey and moved to New York, the result would be the same."), *aff'd* 961 F.2d 1571 (5th Cir. 1992). As a result, Atlas' alleged change of citizenship[1] in the midst of the lawsuit cannot create federal court subject matter jurisdiction. *Scott*, 762 F. Supp. at 151 (merger with company in another state after the institution of the suit did

1. Not only did Atlas keep the limited partners secret from this Court, the jury and defense counsel until its latest filing, it continues to keep the allegedly new general partner secret from the Texas Secretary of State where Mr. Llamosa (a Mexican citizen) is still identified as the registered agent and Bahia Management is still identified as the general partner. Ex. A.

not create diversity jurisdiction). The "substituti[on of] a diverse claimant for a nondiverse party" does not create jurisdiction in this case. *Aetna*, 796 F.2d at 776.

III. *No Dispensable Party Exists To Dismiss To Save Jurisdiction.*

In an effort to solve the lack of jurisdiction, Atlas proposes that the limited partners be dismissed from the lawsuit. Plaintiff's Response at 6. The absence of jurisdiction in this case is not created because Mr. Robles and Mr. Llamosa are plaintiffs. Instead, the absence of jurisdiction exists because the citizenship of the plaintiff, Atlas, itself is based on the citizenship of Mr. Robles and Mr. Llamosa. *Carden*, 494 U.S. at 195. Even the case cited by Atlas - *Mallia v. PaineWebber, Inc.*, 889 F. Supp. 277 (S.D.Tex 1995) - recognized that "claims brought for harms sustained by the limited partnership itself" require the use of the citizenship of the limited partners to determine whether diversity exists. 889 F. Supp. at 281. Unlike *Mallia*, the limited partnership in this case is not a nominal party; it is the only plaintiff. Therefore, Atlas' citizenship must be determined by its limited partners at the time the lawsuit was instituted. *Carden*, 494 U.S. at 195; *Mallia*, 889 F. Supp. at 281. Only one plaintiff and one defendant exist in this case. No additional, dispensable parties exist that can be dismissed to save jurisdiction. Because a dispensable, nondiverse party does not exist in this case, the other cases cited by Atlas do not support Atlas' request that the limited partners be dismissed to save jurisdiction. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 827, 830 (1989) (deciding whether the court of appeals could dismiss a dispensable,

nondiverse party); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 76 (1996) (dismissal of nondiverse party created complete diversity in a removal case). No nondiverse party exists that can be dismissed in this case to save diversity jurisdiction. Therefore, dismissal of the entire case is required.

CONCLUSION

For these reasons, Dataflux requests that this Court grant Defendant's motion to dismiss the lawsuit for lack of subject matter jurisdiction. Defendant further requests all other general and equitable relief to which it may be entitled.

Respectfully submitted,

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EXHIBIT A

TEXAS SECRETARY OF STATE,
CORPORATE RECORD

Name: ATLAS GLOBAL GROUP, L.P.

Principal Office: 5847 SAN FELIPE, STE. 4540
HOUSTON, TEXAS 77057

Type of Limited Partnership: DOMESTIC LIMITED PARTNERSHIP

Status: ACTIVE

Status Date: 06/26/1996

Filing Date: 06/26/1996

State of Origin: TEXAS

Registered Office: 5847 SAN FELIPE, STE. 4540
HOUSTON, TEXAS 77057

Prior Names: ATLAS FINANCIAL GROUP, L.P.
Changed: 08/15/1996

General Partners: BAHIA MANAGEMENT, L.L.C.
5847 SAN FELIPE, STE. 4540
HOUSTON, TEXAS 77057

CAPITAL FINANCIAL PARTNER, INC.
5847 SAN FELIPE, STE. 4540
HOUSTON, TEXAS 77057

Appendix H

Number: 00089817-10

History:

Date Transaction

APPENDIX I — PLAINTIFF'S SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION FILED NOVEMBER 28, 2000

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff,

vs.

GRUPO DATAFLUX,

Defendant.

PLAINTIFF'S SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Atlas Global Group, L.P. files this its Sur-Reply to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and in support thereof would respectfully show the Court as follows:

I.

1. Contrary to Dataflux's argument in its Response, dismissal of this lawsuit is not required under the law nor would it be judicially efficient under the particular circumstances of this case.

2. Dataflux has failed to address the ***Newman-Green*** considerations in this case. *See* ***Newman-Green, Inc. v. Alfonzo-Larrain***, 490 U.S. 826, 104 L. Ed. 2d 893, 109 S. Ct. 2218 (1989)(holding that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention"). The posture of the current case is this: the parties have completed a week-long jury trial and Plaintiff Atlas will file its Motion to Enter Judgment this week.[1] If this Court were to dismiss this lawsuit, Atlas would simply refile in the federal district court against Dataflux. The question would be just how much more time and resources would be spent by the parties and this Court determining these issues a second time. This outcome makes no sense in light of the fact that ***Newman-Green*** provides this Court with a means of salvaging jurisdiction should this Court find it necessary. It is with these situations in mind that the Supreme Court stated that **"once a diversity suit has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming."** *See* ***Caterpillar Inc. v. Lewis***, 519 U.S. 61, 75, 117 S. Ct. 467, 476, 136 L. Ed. 2d 437 (1996). Moreover, it is in this type of situation that ***Newman-Green*** gave the Court an alternative mechanism to salvage jurisdiction if necessary: Newman-Green bestows a Court with the power to dismiss a dispensable nondiverse party from a suit. ***Id.*** at 832-33. While Llamosa and Robles were at one time limited partners of Atlas, their limited partnerships in Atlas no longer exists.

1. The parties have come to an agreement with respect to Atlas's attorneys' fees and Atlas is simply waiting on Dataflux to sign the stipulation regarding same. Once Dataflux signs the stipulation, Atlas will file the Motion.

Moreover, Dataflux never contended that these two individuals were indispensable or necessary party Plaintiffs. Former limited partners Llamosa and Robles can be dismissed in their capacity as limited partners to save jurisdiction.

II.

3. In a footnote, Dataflux avers that Atlas attempted to keep the "limited partners secret from this Court, the jury and the defense counsel until its latest filing." *See* Dataflux's Reply to Atlas' Response to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction at page 3 n.1. This is simply false. Moreover, this is a curious statement in light of the fact that Dataflux sued Mr. Robles and Mr. Llamosa individually. In fact, Dataflux served Robles via the Inter-American Convention on Letters Rogatory and its Additional Protocol, a treaty governing service of process of Mexicans. Dataflux knew what their positions were at Atlas. Dataflux took Robles and Llamosa's depositions and had a full opportunity to discover the limited partners of Atlas. The record in this case speaks for itself: Nothing has been kept "secret" from Dataflux.

4. Exhibit A to Dataflux's Response is an unauthenticated document purporting to be Atlas's corporate record with the State of Texas. Dataflux refers to this document to support its allegation that Atlas has kept its partners "secret" from the State of Texas; Dataflux, however, purposely fails to acknowledge the status date of the record for the partnership, which is **"6/26/96."**

5. This aspersion cast by Dataflux is merely an attempt to divert the Court away from Dataflux's own conduct in this lawsuit: waiting until after a week-long trial and after this Court and the Plaintiff have spent substantial time and resources on this lawsuit and years after they have known the facts about the limited partners' citizenship — to call into question jurisdiction — and force Atlas to jump another hurdle before it recovers what a jury has decided Atlas is owed. While Atlas acknowledges that jurisdiction can be raised at any juncture, sitting on a motion to dismiss for lack of jurisdiction until ***after*** a week-long trial and a jury verdict against one's client is reprehensible conduct.

6. Finally, in contrast to Dataflux's interpretation of the law, under certain circumstances, the citizenship of limited partners can be disregarded for diversity purposes. *See* ***Mallia v. PaineWebber, Inc.***, 889 F. Supp. 277, 283 (S.D. Tex. 1995).

PRAYER

WHEREFORE, PREMISES CONSIDERED Atlas Global Group, L.P. prays that this Court deny Defendant Dataflux's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for such other and further relief, both general and special, at law or in equity, to which Plaintiff may show itself justly entitled to receive.

Respectfully submitted,

s/ Roger B. Greenberg
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ATTORNEYS FOR PLAINTIFF AND COUNTERCLAIM DEFENDANTS ATLAS GLOBAL GROUP, L.P., FRANCISCO LLAMOSA AND OSCAR ROBLES

APPENDIX J — NOTICE TO CORRECT IMMATERIAL FACT DATED AND FILED JANUARY 31, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff

v.

GRUPO DATAFLUX,

Defendant

NOTICE TO CORRECT IMMATERIAL FACT

Plaintiff files this notice and the attached affidavit to correct one fact which is immaterial to any argument advanced in the case. Previously, Plaintiff had informed the Court that there was no question that jurisdiction existed as of the time of trial. That is correct and undisputed. In the affidavit regarding such fact, it was stated that the change took place in April 2000. That is technically incorrect. The contracts governing the transaction under which the ownership changes in the limited partnership took place were executed on or about April 1, 2000, as previously testified. However, it has come to the attention of Plaintiff and Plaintiff's counsel that the contractual documents contained

a condition precedent that was not satisfied until a later date. That condition precedent was satisfied, and the change of ownership became effective on September 8, 2000.

Insofar as the argument about whether there was diversity at the time of trial, this fact is immaterial. The members of the partnership had changed well before trial and there could be no question that diversity existed for more than a month before the case commenced trial. However, Plaintiff felt that the above fact, though immaterial to anything involved in the case, should be corrected on the record before the case proceeded to the next court.

Dated: January 31, 2001.

Respectfully submitted,

s/ Roger B. Greenberg
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ATTORNEYS FOR PLAINTIFFS AND COUNTERCLAIM DEFENDANTS ATLAS GLOBAL GROUP, L.P., FRANCISCO LLAMOSA AND OSCAR ROBLES

Appendix J

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

C.A. NO. H-97-3779

ATLAS GLOBAL GROUP, L.P.,

Plaintiff

v.

GRUPO DATAFLUX,

Defendant

AFFIDAVIT OF ANTONIO MARZIALE

STATE OF TEXAS

COUNTY OF HARRIS

The undersigned, being duly sworn, stated as follows:

"My name is Antonio Marziale. I am over the age of 21, have never been convicted of a crime, and am possessed of sound mind. I have personal knowledge of the matters stated herein.

I am the same Antonio Marziale that previously submitted affidavits in connection with this case.

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In my prior testimony by affidavit I described a transaction in April 2000 whereby the ownership of Atlas Global Group, LP changed. It has come to my attention that the documents which effected that transaction, which were executed on or about April 1, 2000, contained a condition precedent to the transfers of ownership becoming effective. That condition precedent was fully satisfied when there was regulatory approval, from the National Association of Securities Dealers Regulation, Inc. ("NASDR"). NASDR approval was granted on September 8, 2000. A copy of the document whereby Atlas Global was informed of that approval is attached hereto as Exhibit "A".

In all other respects, except for the technicality as to the effective date described above, my prior affidavits were true and correct. The above error was completely innocent and inadvertent and this affidavit is being submitted to correct the record. So that the Court may find it easier to follow this change in the record, I have restated below my previous testimony from my last affidavit, correcting only the date upon which the ownership of the Atlas changed.

Plaintiff Atlas Global Group, L.P. ("Atlas"), is a limited partnership created under Texas law and based in Houston, Texas. Atlas is the plaintiff in the lawsuit in which this affidavit is being submitted ("the Lawsuit"). On or about April 1, 2000, the partners of Atlas entered into a transaction and executed all the documents for such transaction under which the

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partners of Atlas eventually changed. The documents executed on or about April 1, 2000, for the transaction that eventually changed the ownership of Atlas contained a condition to their effectiveness which was satisfied on September 8, 2000, when there was NASDR approval of the transaction. At all times since September 8, 2000, including when this case was tried during a period spanning October 19-26, 2000, the only partners (both general and limited) of Atlas were: HIL Financial Holdings, L.P., and Capital Financial Partner, Inc. HIL Financial Holdings, L.P., is a Texas limited partnership whose only partners (including both general and limited partners) are OFI Management Inc., and OVH, Inc. OFI Management Inc., and OVH, Inc., are the only partners HIL Financial Holdings, L.P., has had at any time while the Lawsuit has been on file. OFI Management Inc., is and, has been at all times while the Lawsuit has been on file, a corporation incorporated in the State of Delaware and having its principal place of business in Houston, Texas. OVH, Inc., is, and has been at all times while the Lawsuit has been on file, a corporation incorporated in the State of Texas and having its principal place of business in Houston, Texas. Capital Financial Partner, Inc., is, and has been at all times while the Lawsuit has been on file, a corporation incorporated under the laws of the State of Delaware and having its principal place of business in Houston, Texas.

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The transaction on or about April 1, 2000, under which the partners of Atlas became, on September 8, 2000, solely HIL Financial Holdings, L.P., and Capital Financial Partner, Inc., did not come about for the purposes of creating jurisdiction in this or any other court. To the contrary, that transaction was done for business reasons that had nothing to do with jurisdiction of the Court over the Lawsuit which was filed by Atlas Global Group, L.P., against Grupo Dataflux and is Cause No. H-97-3779 in the United States District Court for the Southern District of Texas, Houston Division.

From the outset of the case being filed, through completion of trial and the rendering of the jury verdict, Atlas believed that the Lawsuit was properly in federal court and knew of no suggestion or issue to the contrary. Atlas' first information that there was any question or objection raised or suggested by anyone about whether the Lawsuit could be in federal court was not until well after defendant had lost the trial when Atlas learned that the defendant had started to claim that the federal court should not have heard the Lawsuit.

Further affiant sayeth not."

s/ Antonio Marziale
ANTONIO MARZIALE

Appendix J

EXHIBIT B

September 12, 2000

Rafael M. Samano
Atlas Global Group, L.P.
5151 San Felipe, Suite 1550
Houston, TX 77056

RE: Continuing NASD Membership of Atlas Global Group
CRD No. 41567

Dear Mr. Samano:

Pursuant to National Association of Securities Dealers, Inc. ("NASD") Rule 10.4 the District Office staff has approved the firm's change in ownership per your continuing application for membership on September 8, 2000, pursuant to the terms of your Membership Agreement. This letter is to inform you that the District Office staff has received a properly executed Agreement.

If you have any questions, please contact your Core Examiner at (972) 701-8554.

Sincerely,

s/ Christian Zrull
Christian Zrull
Assistant Director

(5)

No. 02-1689

Supreme Court, U.S.
FILED
NOV 26 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GRUPO DATAFLUX,

Petitioner,

v.

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Should a new exception be created to the longstanding rule that diversity jurisdiction must be determined based on the citizenship of the parties and the circumstances that existed at the time suit was filed?

2. Should unilateral changes in a party's citizenship during the course of litigation be allowed to create diversity jurisdiction that did not exist at the time suit was filed?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below are:

Atlas Global Group, L.P. ("Atlas") (plaintiff/counter-defendant/respondent);

Oscar Robles-Canon ("Robles-Canon") (counter-defendant/respondent);

Francisco Llamosa ("Llamosa") (counter-defendant/respondent); and

Grupo Dataflux ("Dataflux") (defendant/counter-claimant/petitioner). Atlas filed suit against "Grupo Dataflux." Joint App. 18a, 34a; 7 R. 11.[1] The parties have stipulated for purposes of this case that Grupo Dataflux can be considered the same company as Dataflux, S.A. de C.V. 2 R. 1580-81.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of Dataflux, S.A. de C.V. is Grupo Dataflux, S.A. de C.V. Grupo Dataflux, S.A. de C.V. is a publicly traded company on the Bolsa Mexicana de Valores.

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1. The record on appeal consists of seven bound volumes of pleadings prepared and sequentially numbered by the district court clerk. The trial testimony was not transcribed and is not part of the record on appeal. The record is cited in this brief as "___ R. ___," citing first by volume and then by page. The appendix to Dataflux's petition for writ of certiorari is cited as "Pet. App." The parties' joint appendix is cited as "Joint App."

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CASES

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American Fire & Cas. Co. v. Finn,
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Anderson v. Watt,
138 U.S. 694 (1891) ..... *passim*

Arizonans for Official English v. Arizona,
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Atlas Global Group, L.P. v. Grupo Dataflux,
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Bender v. Williamsport Area Sch. Dist.,
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Carden v. Arkoma Assocs.,
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Carlton v. BAWW, Inc.,
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Carnegie-Mellon Univ. v. Cohill,
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Chapman v. Barney,
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Choo v. Exxon Corp.,
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City of Indianapolis v. Chase Nat'l Bank,
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Clarke v. Mathewson,
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Conolly v. Taylor,
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Doidge v. Cunard S.S. Co.,
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Dole Food Co. v. Patrickson, 538 U.S. __, 123 S. Ct. 1655 (2003)	11
Dresser Indus., Inc. v. Underwriters at Lloyd's of London, 106 F.3d 494 (3d Cir. 1997)	15
Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp., 506 F.2d 757 (5th Cir. 1975)	15
Eze v. Yellow Cab Co. of Alexandria, Va., Inc., 782 F.2d 1064 (D.C. Cir. 1986)	15
Faysound Ltd. v. United Coconut Chem., Inc., 878 F.2d 290 (9th Cir. 1989)	15
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Freeport-McMoRan Inc. v. K N Energy, Inc., 498 U.S. 426 (1991)	12, 29
Gard v. Teletronics Pacing Sys., Inc., 859 F. Supp. 1349 (D. Colo. 1994)	13
Giannakos v. M/V Bravo Trader, 762 F.2d 1295 (5th Cir. 1986)	15
Goldsmith v. Mayor & City Council of Baltimore, 845 F.2d 61 (4th Cir. 1988)	12

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Grubbs v. General Elec. Credit Corp., 405 U.S. 699 (1972)	24
Hagen v. Payne, 222 F. Supp. 548 (W.D. Ark. 1963)	13
Healy v. Ratta, 292 U.S. 263 (1934)	8, 17
Herrick Co. v. SCS Communications, Inc., 251 F.3d 315 (2d. Cir. 2001)	31, 38
IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975)	15
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)	*passim*
Jackson v. Allen, 132 U.S. 27 (1889)	10
Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829)	15
Keene Corp. v. United States, 508 U.S. 200 (1993)	27
Knop v. McMahan, 872 F.2d 1132 (3d Cir. 1989)	25

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Kokkonen v. Guardian Life Ins. Co. of America,
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Lang v. Windsor Mount Joy Mut. Ins. Co.,
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McNutt v. General Motors Acceptance Corp. of Indiana, Inc.,
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Mollan v. Torrance,
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Montalet v. Murray,
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Morris v. Gilmer,
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Navarro Sav. Ass'n v. Lee,
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Newman-Green, Inc. v. Alfonzo-Larrain,
490 U.S. 826 (1989) ..... *passim*

Nike, Inc. v. Comercial Ibercia de Exclusivas Deportivas, S.A.,
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Oh v. Ford Motor Co.,
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Owen Equip. & Erection Co. v. Kroger,
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Parker & Parsley Petroleum Co. v. Dresser Indus.,
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Rogers v. Aetna Cas. & Sur. Co.,
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Rosado v. Wyman,
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Russell v. Harrison,
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Saadeh v. Farouki,
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Sarmiento v. Texas Bd. of Veterinary Med. Examiners,
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Singh v. AG Daimler-Benz,
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Shamrock Oil & Gas v. Sheets,
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OPINION BELOW

The trial court's dismissal order and order denying Atlas' motion to alter or amend are unpublished. The trial court's orders were entered in C.A. No. H-97-3779; *Atlas Global Group, L.P. v. Grupo Dataflux*; in the United States District Court for the Southern District of Texas, Houston Division. Pet. App. 20a-24a. The court of appeals' opinion is published as *Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168 (5th Cir. 2002). *Id.* at 1a-19a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 22, 2002. Dataflux timely filed a petition for rehearing en banc and petition for panel rehearing. The Fifth Circuit denied the petitions on February 17, 2003. Pet. App. 25a-26a. Dataflux timely filed a petition for writ of certiorari on May 14, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the federal diversity statute, 28 U.S.C. § 1332(a)(2), are reproduced in the appendix to the petition for writ of certiorari. Pet. App. 27a-29a. The portion of Article III of the United States Constitution relating to federal diversity jurisdiction between United States citizens and foreign citizens provides as follows:

> The judicial Power shall extend to . . . Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

STATEMENT OF THE CASE

Atlas sued Dataflux in the United States District Court for the Southern District of Texas on November 18, 1997, alleging claims for breach of contract and quantum meruit. Pet. App. 2a; 7 R. 11. Atlas predicated subject matter jurisdiction solely on 28 U.S.C. § 1332(a)(2), which provides for diversity jurisdiction in cases between "citizens of a State and citizens or subjects of a foreign state. . . ." 28 U.S.C. § 1332(a)(2); Joint App. 19a; Pet. App. 2a; 2 R. 1727; 3 R. 1362; 7 R. 11, 230. In its complaint, Atlas identified itself as a Texas limited partnership without identifying its individual partners. Joint App. 18a; 7 R. 11.

Dataflux is a Mexican corporation with its principal place of business in Mexico. Joint App. 18a; 2 R. 1676; 3 R. 1296, 1361; 7 R. 230. Atlas is a limited partnership created under Texas law. Joint App. 18a, 98a; Pet. App. 2a. A partnership such as Atlas is deemed to be a citizen of each jurisdiction in which its partners are citizens. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990). At the time Atlas filed suit, Atlas was a citizen of Mexico; at least two of its five partners – Llamosa and Robles-Canon – were Mexican citizens. Joint App. 98a; Pet. App. 2a; 2 R. 1716. Thus, diversity did not exist between Atlas, a Mexican citizen, and Dataflux, also a Mexican citizen. Pet. App. 3a.

Effective September 8, 2000, Atlas completed a business transaction in which three of its five partners – Llamosa, Robles-Canon, and Bahia Management, L.L.C. – withdrew from the partnership. Joint App. 98a, 126a-127a; 1 R. 1904, 1906; 2 R. 1715-16. Based on Atlas' change in citizenship, Atlas and Dataflux were diverse by the time the trial began on October 19, 2000. Pet. App. 3a.

The parties' citizenship at the time suit was filed and at the time of trial is summarized as follows:

Parties' Citizenship at Time Atlas Filed Suit	**Parties' Citizenship at Time of Trial**
Dataflux: Mexican corporation with principal place of business in Mexico.	***Dataflux***: Mexican corporation with principal place of business in Mexico.
Atlas: Texas limited partnership composed of: ***Llamosa***: Mexican citizen. ***Robles-Canon***: Mexican citizen. ***Bahia Management, L.L.C.***: A Texas limited liability company composed of: ***Llamosa*** and ***Robles-Canon***: Mexican citizens. ***Capital Financial Partner, Inc.*** ***HIL Financial Holdings, L.P.***	***Atlas***: Texas limited partnership composed of: ***Capital Financial Partner, Inc.***: Delaware corporation with principal place of business in Texas. ***HIL Financial Holdings, L.P.***: Texas limited partnership composed of: ***OFI Management Inc.***: Delaware corporation with principal place of business in Texas. ***OVH, Inc.***: Texas corporation with principal place of business in Texas.

Joint App. 18a, 67a, 73a, 98a, 126a-127a; 1 R. 1903-04; 2 R. 1672, 1676, 1715-16; 3 R. 1296, 1361; 7 R. 230.[2]

2. Dataflux asserted state-law claims against Llamosa and Robles-Canon, and against Atlas. 7 R. 124-29, 185-90. The addition of state-law claims by Dataflux against Llamosa and Robles-Canon individually does not affect whether jurisdiction existed between Atlas and Dataflux. If diversity had existed between Atlas and Dataflux at

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The parties consented to a jury trial before United States Magistrate Judge Frances H. Stacy. 2 R. 1548. On October 27, 2000, following a six-day trial, the jury returned a verdict in Atlas' favor and awarded damages. Pet. App. 2a; 2 R. 1601-46.

On November 8, 2000, after the verdict but before entry of judgment, Dataflux moved to dismiss the suit for lack of jurisdiction under Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3). Joint App. 42a-49a; 2 R. 1658-61, 1691-95.[3] Dataflux explained that diversity jurisdiction did not exist at the time Atlas filed suit because Dataflux and at least one of Atlas' partners were Mexican citizens. *Id.* The trial court granted Dataflux's motion to dismiss and denied Atlas' motion to alter or amend the order granting dismissal. Pet. App. 20a-24a. Atlas appealed.

A divided panel of the United States Court of Appeals for the Fifth Circuit reversed the trial court's dismissal and remanded the case "with instructions to the district court to enter judgment in favor of Atlas." *Id.* at 11a.

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the time Atlas filed suit, then the claims against Llamosa and Robles-Canon individually would have fallen within the scope of supplemental jurisdiction. *See, e.g., Rogers v. Aetna Cas. & Sur. Co.*, 601 F.2d 840, 843 n.4 (5th Cir. 1979). Because it is undisputed that Atlas and Dataflux were not diverse when Atlas filed suit, however, there was no federal jurisdiction in existence at that time to be supplemented.

3. In its brief in opposition to Dataflux's petition for writ of certiorari, Atlas noted that it sought "in no way to suggest that Dataflux or its counsel engaged in . . . inappropriate behavior" in objecting to the trial court's subject-matter jurisdiction after verdict but before entry of judgment. Br. in Opp. to Pet. for Cert., p. 6 n.1.

The panel majority held that the trial court erred in dismissing Atlas' suit for lack of jurisdiction because: (1) the lack of diversity between Atlas and Dataflux at the time suit was filed was cured shortly before trial by Atlas' unilateral change in citizenship; and (2) neither the parties nor the trial court identified the absence of diversity jurisdiction before the verdict was returned. *Id.* Judge Emilio M. Garza dissented on the ground that the trial court properly dismissed the suit because diversity was lacking at the time Atlas filed suit in federal court. *Id.* at 12a-19a.

Dataflux filed a petition for rehearing en banc and petition for panel rehearing; the Fifth Circuit denied those petitions. *Id.* at 25a-26a.[4]

SUMMARY OF ARGUMENT

This Court should reject the Fifth Circuit's new exception to the longstanding rule requiring diversity jurisdiction to be determined based on the parties' citizenship at the time suit is filed.

The time-of-filing rule has been faithfully enforced for nearly 200 years, and for good reason. This bright-line rule confines federal courts to their constitutionally mandated territory. It also establishes an easy-to-apply standard so that threshold jurisdictional questions can be decided once, and decided consistently.

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4. In its petition for rehearing en banc, Dataflux asked the Fifth Circuit to review the merits of the panel majority's decision to reverse the trial court's dismissal order. In a separate motion for panel rehearing, Dataflux asked the panel majority to modify its instruction to "enter judgment in favor of Atlas" and to order, instead, that the case be remanded for further proceedings not inconsistent with the majority's holding. The latter instruction would have been consistent with the procedural history of the underlying proceeding in which the trial court's dismissal order was entered prior to the entry of judgment on the verdict.

The Fifth Circuit's ill-defined exception departs from the traditional rule by allowing a party to create diversity jurisdiction through a unilateral change of citizenship after suit is filed. This retroactive jurisdiction arises if: (1) the unilateral change occurs before a verdict is returned, or before "a dispositive ruling has been made by the court"; and (2) neither a litigant nor the trial court identifies the jurisdictional defect before a verdict is returned or a dispositive ruling is made. This exception threatens to swallow the time-of-filing rule. It also undermines the equally well-established presumption against federal jurisdiction and the principle that defects in subject matter jurisdiction cannot be waived.

The Fifth Circuit justified its departure from settled law in the name of judicial economy and looked for help from this Court's decisions in *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), and *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). The Fifth Circuit misplaced its reliance on *Caterpillar* and *Newman-Green* because those cases addressed removal and dismissal circumstances that are not present here. Removal and dismissal involve court participation and supervision – a crucial factor that serves as a brake on any potential jurisdictional manipulation, and one that disappears when a party is allowed to create retroactive diversity jurisdiction based on a unilateral change in its own citizenship. The D.C. Circuit properly has refused to extend the reach of *Caterpillar* and *Newman-Green* in this manner. This Court should endorse the D.C. Circuit's approach.

Judicial economy is not the measure of diversity jurisdiction. Citizenship at the time of filing is the benchmark. Moreover, considerations of judicial economy

cut against the Fifth Circuit's new exception. The uncertainty and manipulation likely to flow from the new exception will consume far more judicial resources than are saved.

The Fifth Circuit's judgment should be reversed, and the trial court's dismissal for lack of subject matter jurisdiction should be affirmed.

ARGUMENT

Until the Fifth Circuit issued its opinion in this case, the rule for determining whether Atlas established federal diversity jurisdiction was straightforward. Under longstanding precedent, the parties' citizenship is measured based on the facts and circumstances as they existed at the time suit was filed. This Court should reject the Fifth Circuit's departure from the time-of-filing rule because that departure is unwarranted, unworkable, and unwise.

I. Diversity Jurisdiction Is Narrowly Construed

A. Atlas Must Overcome the Presumption Against Jurisdiction

Atlas invoked diversity jurisdiction when it sued Dataflux in federal court. Joint App. 19a; Pet. App. 2a; 2 R. 1727; 3 R. 1362; 7 R. 11, 230. Article III of the Constitution provides that "[t]he judicial Power shall extend to . . . Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1. The diversity statute further circumscribes the scope of federal jurisdiction by providing that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of

$75,000 . . . and is between . . . citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. § 1332(a)(2).[5]

Diversity jurisdiction under 28 U.S.C. § 1332 is narrowly construed:

> The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of "business that intrinsically belongs to the state courts," in order to keep them free for their distinctive federal business.

City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941) (quoting Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928)); *see also Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978); *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

In keeping with this "jealous restriction" of diversity jurisdiction, federal courts presume that a suit lies outside their limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The burden of overcoming this presumption and establishing the propriety

5. "Although neither the Constitution nor the applicable statute utilizes the terms, these 'citizens or subjects of a foreign state' generally are referred to as aliens and the subject matter jurisdiction so conferred is referred to as alienage jurisdiction." 14A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3661 at 132 (3d ed. 1998) (hereinafter "14A WRIGHT, MILLER & COOPER").

of federal jurisdiction rests on the party asserting federal jurisdiction. *Id.*; *McNutt v. General Motors Acceptance Corp. of Indiana, Inc.*, 298 U.S. 178, 189 (1936). Thus, Atlas bears the burden of establishing jurisdictional facts sufficient to support federal jurisdiction in this case. *Id.*

B. Lack of Diversity Cannot Be Waived

As a corollary to the strict limits on federal jurisdiction, litigants cannot waive or consent to subject matter jurisdiction when it does not exist and may challenge the existence of subject matter jurisdiction at any time during the litigation. As this Court stated in *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982):

> [N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.

Id. at 702 (citations omitted).[6]

6. *See also Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389 (1998) ("The presence of the nondiverse party automatically destroys original jurisdiction: No party need assert the defect. No party can waive the defect, or consent to jurisdiction") (citations omitted); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) ("'[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it'") (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)).

Any court may raise at any time the lack of subject-matter jurisdiction on its own motion. FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").[7] Indeed, this Court itself has raised the lack of subject matter jurisdiction for the first time after lower court proceedings in which jurisdiction was not challenged and the jurisdictional defect was not identified. *E.g.*, *Jackson v. Allen*, 132 U.S. 27, 34 (1889); *Crehore v. Ohio & Miss. Ry. Co.*, 131 U.S. 240, 243 (1889); *Chapman v. Barney*, 129 U.S. 677, 681 (1889).

These considerations provide the backdrop against which the time-of-filing rule should be analyzed.

II. The Narrow Reach of Diversity Jurisdiction Is Reflected in the Time-of-Filing Rule, Which Establishes That Atlas and Dataflux Were Not Diverse

A. Diversity Depends on the Parties' Citizenship at the Time Suit Is Filed

The existence of subject matter jurisdiction under the diversity statute "turns on the facts existing at the time the suit commenced." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458,

7. *See also Wisconsin Dep't of Corrections*, 524 U.S. at 389 ("No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own"); *Bender*, 475 U.S. at 541 ("Every federal appellate court has a special obligation 'to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it") (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)); *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702 ("Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion").

459 n.1 (1980) (citing *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552, 556 (1899)).

This rule traces its origins to at least 1824, when Chief Justice Marshall stated, "It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought. . . ." *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824). This Court repeatedly has reaffirmed this principle in the 180 years since Chief Justice Marshall's pronouncement in *Mollan*. *See, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. ___, 123 S. Ct. 1655, 1662 (2003) ("It is well settled . . . that federal-diversity jurisdiction depends on the citizenship of the parties at the time suit is filed"); *Navarro Sav. Ass'n*, 446 U.S. at 459 n.1; *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957); *Anderson v. Watt*, 138 U.S. 694, 702-03 (1891).[8]

8. Subsequent court-supervised developments can affect the general time-of-filing rule under certain circumstances. If an amendment adds an indispensable party, jurisdiction must be reassessed at that time. *E.g.*, *Carlton v. BAWW, Inc.*, 751 F.2d 781, 785-86 (5th Cir. 1985). The existence of diversity also may be reassessed based on a court's realignment of the parties. *E.g.*, *City of Indianapolis*, 314 U.S. at 69, 74-75; *Standard Oil Co. v. Perkins*, 347 F.2d 379, 382 (9th Cir. 1965). Under Federal Rule of Civil Procedure 21, a court may preserve diversity jurisdiction by dismissing a non-diverse party who is not indispensable. *E.g.*, *Newman-Green, Inc.*, 490 U.S. at 833, 837. And in the removal context, a trial court's failure to remand an improperly removed case does not invalidate the ensuing judgment if dismissal of a non-diverse party means that federal jurisdictional requirements are met at the time judgment is entered. *E.g.*, *Caterpillar Inc.*, 519 U.S. at 64. The limits of *Caterpillar* and *Newman-Green* are discussed more fully below at pp. 20-30.

It follows from the time-of-filing rule that subsequent changes in citizenship do not change the threshold determination regarding the existence of diversity. Post-filing changes in citizenship or reductions in the amount recovered do not destroy diversity jurisdiction once it has been established at the commencement of litigation. *See, e.g.*, *Wisconsin Dep't of Corrections*, 524 U.S. at 391; *Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam); *Smith*, 354 U.S. at 93 n.1; *Wichita R.R. & Light Co. v. Public Util. Comm'n*, 260 U.S. 48, 54 (1922); *Smithers v. Smith*, 204 U.S. 632, 642-43 (1907); *Louisville, New Albany & Chicago Ry. Co.*, 174 U.S. at 563.

Similarly, if no diversity existed when the action was commenced, a litigant cannot manufacture diversity by unilaterally changing its citizenship after suit is filed. *Anderson*, 138 U.S. at 702-03.[9] Because this principle

9. Numerous lower court decisions have recognized that a party's unilateral change in citizenship after suit is filed cannot create retroactive diversity jurisdiction. *See, e.g., Sarmiento v. Texas Bd. of Veterinary Med. Examiners*, 939 F.2d 1242, 1247 n.6 (5th Cir. 1991) (diversity jurisdiction did not exist based on plaintiff's domicile at time suit was filed despite plaintiff's subsequent change in domicile after suit was filed); *Goldsmith v. Mayor & City Council of Baltimore*, 845 F.2d 61, 62 n.1 (4th Cir. 1988) (affirming dismissal of claim where party sought to create retroactive diversity jurisdiction based on party's unilateral change in citizenship after suit was filed); *Field v. Volkswagenwerk AG*, 626 F.2d 293, 304 (3d Cir. 1980) ("Thus, if diversity of citizenship did not exist at the time the action was filed, it cannot be created retroactively by a subsequent change of domicile by one of the parties"); *DeBry v. Transamerica Corp.*, 601 F.2d 480, 486 (10th Cir. 1979) ("It is hornbook law that . . . if there was no diversity when the action was commenced, it is impossible to create

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controls the outcome of this case, a discussion of the facts and holding in *Anderson* is instructive.

In *Anderson*, the dual executors of a New York resident's estate alleged that they were citizens of New York and brought a diversity action against defendants alleged to be Florida residents. *Id.* at 695, 703-04. It was later determined that one of the defendants was a New York citizen. *Id.* at 704-06. The plaintiffs attempted to save diversity jurisdiction by

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it by a change of domicile by one of the parties or other subsequent event"); *Slaughter v. Toye Bros. Yellow Cab Co.*, 359 F.2d 954, 956 (5th Cir. 1966) ("It seems to be without question that a change of citizenship occurring after the commencement of the action would not affect jurisdiction or the absence of it"); *Lyons v. Weltmer*, 174 F.2d 473, 473 (4th Cir. 1949) (per curiam) (affirming dismissal of claim where party sought to create retroactive diversity jurisdiction based on party's unilateral change in citizenship after suit was filed); *Oh v. Ford Motor Co.*, 79 F. Supp. 2d 1375, 1377-78 (N.D. Ga. 1999) (granting motion to remand where diversity jurisdiction was based on defendant's change in citizenship after suit was filed); *Gard v. Teletronics Pacing Sys., Inc.*, 859 F. Supp. 1349, 1354-55 (D. Colo. 1994) (rejecting diversity jurisdiction as alternative basis for jurisdiction over party's claims based on party's change in citizenship after suit was filed); *Russell v. Harrison*, 562 F. Supp. 467, 471 (N.D. Miss. 1983) (rejecting diversity jurisdiction as basis for bringing breach of contract claim in federal court based on parties' change in citizenship after suit was filed), *aff'd and rev'd on other grounds*, 736 F.2d 283 (5th Cir. 1984); *Lang v. Windsor Mount Joy Mut. Ins. Co.*, 487 F. Supp. 1303, 1306-07 (E.D. Pa. 1980) (granting motion to dismiss where diversity jurisdiction was based on plaintiff's change in citizenship after suit was filed), *aff'd without opinion*, 636 F.2d 1209 (3d Cir. 1980); *Hagen v. Payne*, 222 F. Supp. 548, 553 (W.D. Ark. 1963) (granting motion to remand where diversity jurisdiction was based on defendant's change in citizenship after suit was filed).

applying to have the letters testamentary that had been issued to one of the executors revoked, seeking leave to drop that executor as a plaintiff, and alleging that the remaining executor was a resident of Great Britain. *Id.* at 708.

This Court rejected the plaintiffs' post-filing effort to salvage federal jurisdiction. *Id.* The Court reiterated that "the [jurisdictional] inquiry is determined by the condition of the parties at the commencement of the suit." *Id.* at 703. Applying that rule, the Court stated as follows: "[J]urisdiction could no more be given . . . by the amendment than if a citizen of Florida had sued another in that court and subsequently sought to give it jurisdiction by removing from the State." *Id.* at 708 (citing *Clarke v. Mathewson*, 37 U.S. (12 Pet.) 164 (1838), and *Morris v. Gilmer*, 129 U.S. 315 (1889)).

This statement in *Anderson* was hardly novel in 1891; the time-of-filing rule already was well-established by that time. *See Mollan*, 22 U.S. (9 Wheat.) at 539; *see also Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829) ("Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit").

B. Diversity Did Not Exist Between Atlas and Dataflux Under the Time-of-Filing Rule

Applying the traditional time-of-filing rule in this case leads to one inescapable conclusion: Atlas did not satisfy its burden to establish federal jurisdiction because diversity did not exist when Atlas sued Dataflux in federal court. Pet. App. 3a.

The Atlas limited partnership was a citizen of Mexico at the time suit was filed based on the Mexican citizenship of its partners Llamosa and Robles-Canon. Joint App. 98a; Pet. App. 2a; 2 R. 1716; *Carden*, 494 U.S. at 195. Dataflux is a Mexican corporation with its principal place of business in Mexico. Joint App. 98a; 2 R. 1676; 3 R. 1296, 1361; 7 R. 230. Diversity under 28 U.S.C. § 1332(a) must be complete so that the citizenship of all plaintiffs differs from the citizenship of all defendants. *E.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 580 n.2 (1999); *Carden*, 494 U.S. at 187; *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

The complete diversity requirement applies to alienage jurisdiction under 28 U.S.C. § 1332(a)(2). *E.g.*, *Ruhrgas AG*, 526 U.S. at 580 n.2 & 584; *Montalet v. Murray*, 8 U.S. (4 Cranch) 46, 46 (1807).[10] When, as in this case, both the plaintiff and the defendant are "citizens or subjects of a foreign state," alienage jurisdiction is lacking and 28 U.S.C. § 1332(a)(2) cannot serve as a basis for diversity jurisdiction. *See, e.g.*, *Ruhrgas AG*, 526 U.S. at 580 n.2; *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136, 136 (1829); *Montalet*, 8 U.S. (4 Cranch) at 47.[11]

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10. *See also Singh v. AG Daimler-Benz*, 9 F.3d 303, 305 (3d Cir. 1993); *Faysound Ltd. v. United Coconut Chem., Inc.*, 878 F.2d 290, 294-95 (9th Cir. 1989); *Eze v. Yellow Cab Co. of Alexandria, Va., Inc.*, 782 F.2d 1064, 1065 (D.C. Cir. 1986) (per curiam); *Field*, 626 F.2d at 296; *Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp.*, 506 F.2d 757, 758 (5th Cir. 1975).

11. *See also Dresser Indus., Inc. v. Underwriters at Lloyd's of London*, 106 F.3d 494, 498-99 (3d Cir. 1997); *Nike, Inc. v. Comercial Ibercia de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 991 (9th Cir. 1994); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1986) (per curiam); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975); *Doidge v. Cunard S.S. Co.*, 19 F.2d 500, 502 (1st Cir. 1927); 14A WRIGHT, MILLER & COOPER § 3661 at 134.

Applying the traditional time-of-filing rule, the trial court properly dismissed this suit and no unilateral, post-commencement reshuffling of Atlas' partnership should change that result. This result comports with the origins and purposes of alienage jurisdiction. The concern for bias toward an alien litigating against a citizen of a state is absent when aliens are present on both sides of the suit. "Congress presumably has never seen any federal interest in providing a federal forum for cases of this character, which can be litigated in a state court or in a court in another country." 14A WRIGHT, MILLER & COOPER § 3661 at 134-37; *see also Choo v. Exxon Corp.*, 764 F.2d 1148, 1153 (5th Cir. 1985) ("When . . . an alien plaintiff sues in state court another alien . . . the danger is remote that the alien plaintiff will benefit from local bias of state courts or juries"), *rev'd on other grounds*, 486 U.S. 140 (1988).

Under these circumstances, the trial court properly dismissed Atlas' suit for lack of subject matter jurisdiction. That dismissal not only comported with governing standards for diversity jurisdiction, but also with the policy goals underlying those standards.

C. Enforcing the Time-of-Filing Rule Serves Important Policy Interests and Provides Practical Benefits

This Court has stressed that the narrow limits on diversity jurisdiction are grounded in "the constitutional limitations upon the judicial power of the federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts." *City of Indianapolis*, 314 U.S. at 76.

The constitutional and statutory limits on diversity jurisdiction reflect a carefully calibrated allocation of power between federal and state courts:

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Healy, 292 U.S. at 270; *see also Ruhrgas AG*, 526 U.S. at 583; *City of Indianapolis*, 314 U.S. at 76-77.

Therefore, strict enforcement of the limits on federal jurisdiction "is not a sacrifice of justice to technicality." *City of Indianapolis*, 314 U.S. at 76. Rather, uniform and predictable application of threshold jurisdictional rules, such as the time-of-filing rule, ensures that "[s]ettled restrictions against bringing local disputes into the federal courts cannot . . . be circumvented." *Id.*

The rules governing the time at which diversity jurisdiction is determined also serve important practical purposes by providing "maximum stability and certainty to the viability of the action" and minimizing "repeated challenges to the court's subject matter jurisdiction." 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD

H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3608 at 452 (2d ed. 1984) (hereinafter "13B WRIGHT, MILLER & COOPER"); *see also Saadeh v. Farouki*, 107 F.3d 52, 57 (D.C. Cir. 1997) ("Were it necessary to track changes of citizenship throughout litigation, courts would face potentially difficult burdens of either holding cases in abeyance for the diversity requirements to be satisfied or, alternatively, repeatedly adjudicating challenges to previous determinations that diversity jurisdiction existed"); *Dery v. Wyer*, 265 F.2d 804, 808 (2d Cir. 1959) ("[T]he sufficiency of jurisdiction should be determined once and for all at the threshold").[12]

The bright-line rule also provides "a uniform test that is relatively easy to apply." *Saadeh*, 107 F.3d at 57 (quoting 13B WRIGHT, MILLER & COOPER § 3608 at 452); *see also American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 8 (1951) ("[P]rompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts"); *McNutt*, 298 U.S. at 188 ("[T]here should be a consistent practice in dealing with jurisdictional questions").

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12. If the time-of-filing rule is modified, it is unclear how a party would monitor an opponent's citizenship during the course of litigation to ensure not only that jurisdiction continues to exist after suit is filed, but also that the court's jurisdiction is promptly challenged if diversity disappears. While the party who invoked federal jurisdiction should bear the burden of informing the court and the other parties if the party's citizenship has changed, it certainly is possible that a party may fail to do so based on a good-faith belief that the change in citizenship does not affect diversity jurisdiction under the time-of-filing rule.

In light of these important policy and practical considerations, the Fifth Circuit's new exception to the time-of-filing rule merits close scrutiny. As explained more fully below, such an examination confirms the new exception should be rejected.

III. To Protect the Time-of-Filing Rule From Erosion, This Court Should Reject the Fifth Circuit's Extension of *Caterpillar* and *Newman-Green*

A. The Fifth Circuit Created a New Exception to the Time-of-Filing Rule

The Fifth Circuit held that a party's unilateral change of citizenship after suit is filed creates retroactive diversity jurisdiction if:

> (1) an action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met;
>
> (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a "dispositive ruling" has been made by the court; and
>
> (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured.

Pet. App. 11a.

The Fifth Circuit acknowledged the general rule requiring diversity jurisdiction to be determined based on the parties' citizenship as it existed at the time suit is filed, but concluded that a departure from this rule was warranted.[13]

By unleashing a new exception to the time-of-filing rule, the Fifth Circuit's decision goes far beyond the two principal cases upon which the Fifth Circuit relied, *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), and *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). Neither *Caterpillar* nor *Newman-Green* supports the new exception created in this case.

B. *Caterpillar* Does Not Support The New Exception

Caterpillar does not abrogate the general rule that if diversity was lacking when suit was filed, it cannot be created by a party's post-filing, unilateral change in citizenship. This Court addressed only whether "the absence of complete diversity at the time of removal is fatal to federal-court adjudication." 519 U.S. at 64.

The plaintiff in *Caterpillar*, a Kentucky resident, sued Caterpillar and another defendant in state court. *Id.* at 64-65. Caterpillar was a Delaware corporation with its principal

13. In creating its new exception, the Fifth Circuit did not identify any statute or rule authorizing a party to remedy defects in diversity jurisdiction by unilaterally changing its citizenship after suit is filed. Such authority does not derive from 28 U.S.C. § 1653, which merely authorizes the amendment of defective jurisdictional allegations, not jurisdictional facts. 28 U.S.C. § 1653; *Newman-Green, Inc.*, 490 U.S. at 831; *see also Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir. 1986) ("Section 1653 provides a method of curing defective allegations of jurisdiction. It is not to be used to create jurisdiction retroactively where it did not previously exist").

place of business in Illinois, while the other defendant was a Kentucky corporation with its principal place of business in Kentucky. *Id.* at 65. The plaintiff later entered into a settlement agreement with the non-diverse defendant. *Id.* After the settlement but before the defendant was dismissed, Caterpillar removed the case to federal court based on diversity jurisdiction. *Id.* The plaintiff moved to remand the case, arguing that the federal court lacked diversity jurisdiction because another intervening plaintiff in the case still maintained a subrogation claim against the non-diverse defendant. *Id.* at 65-66. The trial court refused to remand the case. *Id.* at 66.

Shortly before trial, the trial court dismissed the non-diverse defendant after the intervening plaintiff settled its subrogation claim against the defendant. *Id.* Judgment subsequently was entered in Caterpillar's favor. *Id.* at 67. The Sixth Circuit reversed and vacated the judgment, holding that the case was improperly removed. *Id.* This Court held that a trial court's error in failing to remand an improperly removed case over objection "is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Id.* at 64.

Caterpillar does not support the Fifth Circuit's new exception to the time-of-filing rule for determining citizenship. Unlike this case, the parties to the judgment in *Caterpillar* started out diverse and stayed diverse throughout the litigation. *Id.* at 64-67. The only jurisdictional defect at the time of removal was the initial presence of another defendant who was not diverse from the plaintiff, but who was dismissed before trial. *Id.* at 65-66. Thus, in upholding

the trial court's judgment despite the existence of a jurisdictional defect at the time of removal, this Court did not depart from the bright-line rule that a party's citizenship is determined at the time suit is filed. The parties who remained in the case and whose rights were adjudicated in the final judgment ***were diverse*** at the time suit was filed. In this case, in contrast, Atlas and Dataflux indisputably ***were not diverse*** at the time suit was filed and became diverse only when Atlas unilaterally changed its citizenship after suit was filed. Pet. App. 2a-3a.

Caterpillar therefore is inapposite because it addressed the dismissal of a party following removal. It did not address the effect that should be given to a party's unilateral change in citizenship after suit is underway when no party is dismissed.[14]

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14. The Fifth Circuit's creation of retroactive diversity jurisdiction also differs from the discretionary exercise of supplemental jurisdiction over state-law claims following the elimination of federal claims. *See* 28 U.S.C. § 1367(c); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 & n.7 (1988); *Rosado v. Wyman*, 397 U.S. 397, 403-05 (1970). The exercise of supplemental jurisdiction over related state-law claims flows from the proper invocation of federal jurisdiction at the outset of litigation; the power to adjudicate pendent claims remains even if the federal claims fail on the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). It is one thing to balance considerations of "judicial economy, convenience, fairness, and comity" in deciding the reach of supplemental jurisdiction over pendent state-law claims in a case properly filed in federal court. *See Cohill*, 484 U.S. at 350 & n.7. It is quite another to allow notions of judicial economy to justify the creation of retroactive subject matter jurisdiction in a case in which diversity did not exist at the time of filing.

Unlike a party's unilateral decision to change its citizenship, the procedure for removal and dismissal of parties is subject to significant judicial oversight. *Caterpillar Inc.*, 519 U.S. at 77. The removal must be able to withstand the scrutiny prompted by a motion to remand, and the trial court must address any motions to dismiss a party. *Id.* Because the trial court determines whether the procedural requirements for removal have been met, the prospects for jurisdictional manipulation are diminished. *Id.*

In *Caterpillar*, this Court relied heavily on this point and concluded that the likelihood of manipulation would be diminished because the removing party would have to "gamble that any jurisdictional defect, for example, the absence of complete diversity, [would] first escape detection, then disappear prior to judgment." *Id.* In contrast, Atlas faced no such gamble. Pet. App. 15a (Garza, J., dissenting). Atlas had complete control over whether its two Mexican partners remained in the company. *Id.* "Atlas could – and did – single-handedly remove the parties whose presence spoiled diversity" without judicial oversight. *Id.*

The likelihood of jurisdictional manipulation is increased under the Fifth Circuit's new exception because the judicial supervision discussed in *Caterpillar* is absent when a party unilaterally changes its citizenship. The new exception would allow a plaintiff to file a complaint, knowing the federal court had no jurisdiction, and then move to a new state to create retroactive diversity. *Id.* "As long as the party acted before the opposing party or the district court noticed (and before a jury verdict or other dispositive decision), it could single-handedly confer jurisdiction on the federal courts" despite the longstanding rules barring such a maneuver. *Id.* at 16a.

Even taking as a given that Atlas was not attempting to manipulate jurisdiction, the Fifth Circuit's new exception nonetheless opens the door to stratagems of this nature in future cases.

More fundamentally, *Caterpillar*'s holding cannot be divorced from the removal context in which it arose because the jurisdictional issue in *Caterpillar* was viewed through the lens of the statutes and policies governing removal.

This Court found the result in *Caterpillar* to be "in harmony with a main theme of the removal scheme Congress devised," which the Court characterized as "expeditious superintendence by district courts" unburdened by extensive appellate second-guessing. *Caterpillar Inc.*, 519 U.S. at 76. The policy of deferring to a district court's resolution of removal issues is illustrated by such features as the short deadline for objecting to defects in removal procedure and Congress' decision to foreclose appellate review of orders granting remand in most circumstances. *Id.*; *see also* 28 U.S.C. §§ 1447(c)-(d); *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 705 (1972) ("'[T]he Act of Congress must be construed as setting up its own criteria . . . for determining in what instances suits are to be removed from the state to the federal courts'") (quoting *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100, 104 (1941)).

These considerations informed this Court's analysis of the statutory error at issue in *Caterpillar*. That statutory error was the "failure to comply with the [28 U.S.C.] § 1441(a) requirement that the case be fit for federal adjudication when the removal petition is filed." *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 43 (1998). As this Court observed in *Lexecon*, "[T]here was no continuing

defiance of the congressional condition in *Caterpillar*, but merely an untimely compliance" with Section 1441(a). *Id.* "It was on this understanding that we held that considerations of 'finality, efficiency and economy' trumped the error" under Section 1441(a). *Id.* (quoting *Caterpillar*, 519 U.S. at 75).[15]

In short, removal procedure is not at issue in this case, and it does not filter the jurisdictional inquiry here. What remains is the insurmountable fact that no diversity existed when Atlas sued Dataflux in federal court. In contrast to the deferential policy of "superintendence by district courts" that characterizes removal, this case involves an undisputed failure to satisfy 28 U.S.C. § 1332(a)(2) and the policy requiring courts at ***any*** level to confront defects in subject matter jurisdiction. *Bender*, 475 U.S. at 541; *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702. This situation falls squarely

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15. *Knop v. McMahan*, 872 F.2d 1132 (3d Cir. 1989), which was cited in *Caterpillar*'s discussion of judicial economy (519 U.S. at 76), also arose in the removal context. Like this Court in *Caterpillar*, the Third Circuit looked to longstanding rules governing removal in concluding that a limited partnership's change in citizenship could remedy "a brief lack of complete diversity at the beginning of the case." 872 F.2d at 1138-40. In so doing, the Third Circuit acknowledged its prior decision in *Field v. Volkswagenwerk AG*, in which the time-of-filing rule was applied. *Id.* at 1138 (citing *Field*, 626 F.2d at 305). The Third Circuit neither overruled nor questioned *Field*. Instead, the Third Circuit focused on the defects in removal procedure at issue in *Knop*. *Id.* at 1138-41. This focus confirms that *Field*'s endorsement of the time-of-filing rule to bar the creation of retroactive diversity jurisdiction based on a party's post-filing change in citizenship (626 F.2d at 304) remains a governing principle in the Third Circuit in cases outside the removal context. This Court in *Caterpillar* did not discuss the nature of the jurisdictional defect in *Knop* or the manner in which that jurisdictional defect was resolved. 519 U.S. at 76.

within the longstanding rule governing the time at which the citizenship of each party is determined. The policies underlying the time-of-filing rule are not disturbed by *Caterpillar*, and they are reaffirmed by one of the primary cases upon which *Caterpillar* relied. *See Finn*, 341 U.S. at 17-18 ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties").

C. *Newman-Green* Does Not Support the New Exception

The Fifth Circuit also misplaced its reliance on *Newman-Green*. That case addressed the narrow issue of whether an appellate court may dismiss a non-diverse dispensable party to cure a jurisdictional defect or, instead, must remand the case to the trial court to determine if dismissal is proper. 490 U.S. at 832-33. Citing Federal Rule of Civil Procedure 21, this Court held that a court of appeals may dismiss a dispensable non-diverse party to preserve federal jurisdiction but admonished that this authority "should be exercised sparingly." *Id.* at 836-37.

Newman-Green is inapposite because the only jurisdictional defect in that case was the presence of a defendant (one of six) at the time of filing who was not diverse from the plaintiff. *Id.* at 828. This Court did not depart from the bright-line rule that requires a party's citizenship to be determined at the time suit is filed, because the jurisdictional defect in *Newman-Green* was cured by the dismissal of the non-diverse defendant, not by a party's post-filing change in citizenship.

The context in which *Newman-Green* arose – the dismissal of a party – makes it ill-suited to serve as a supporting pillar for the Fifth Circuit's new exception. In contrast to *Newman-Green*, Atlas and Dataflux are indispensable parties. If Atlas had been dismissed, no plaintiff would have existed. Atlas' unilateral change in citizenship cannot properly be equated with a court of appeals' dismissal of a dispensable party. And in this case, unlike *Newman-Green*, the crucial element of judicial control and supervision once again is missing.

The limited reach of *Newman-Green* is confirmed by *Keene Corp. v. United States*, 508 U.S. 200 (1993). In *Keene*, the plaintiff relied on *Newman-Green* in asking this Court to create a new exception to the time-of-filing rule based on practical considerations. The Court declined to do so:

> We need not decide whether Keene's reading [of *Newman-Green*] is accurate, for Keene has not shown that we should [create an exception to the time-of-filing rule], even if we could. We do note, however, that *Newman-Green* reiterated the principle that "the existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."

Id. at 208 n.3 (quoting *Newman-Green, Inc.*, 490 U.S. at 830).

As it did in *Keene*, the Court should reject reliance on *Newman-Green* in this case as justification for creating a new exception to the time-of-filing rule.

D. This Court Should Endorse the D.C. Circuit's Refusal to Extend *Caterpillar* and *Newman-Green*

The Fifth Circuit's error is underscored by *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997), in which the United States Court of Appeals for the District of Columbia Circuit properly refused to expand *Caterpillar* and *Newman-Green*, and properly refused to recognize retroactive diversity jurisdiction based on a litigant's post-filing change in citizenship. The Fifth Circuit acknowledged the D.C. Circuit's conflicting holding in *Saadeh* but summarily rejected the D.C. Circuit's analysis as "unpersuasive." Pet. App. 9a.

In *Saadeh*, complete diversity did not exist when the plaintiff filed his complaint because the plaintiff, an alien, had sued a group of defendants which included several aliens and a domestic corporation. *Saadeh*, 107 F.3d at 55-56. Two of the three defendant aliens were dismissed prior to trial, leaving one defendant alien in the case. *Id.* at 56. Pointing to *Caterpillar* and *Newman-Green*, the plaintiff argued that the defendant alien became a United States citizen after suit was filed but before trial commenced, curing the jurisdictional defect. *Id.*

The D.C. Circuit rejected this argument. *Id.* at 56-57 ("[The defendant's] change in citizenship and possible change in domicile could not cure a defect in complete diversity if one existed at the time [the plaintiff] filed his complaint"); *id.* at 57 ("[The plaintiff] cites a number of cases involving removal for the proposition that the court may take account of [the defendant's] change in citizenship, but neither these cases nor the Supreme Court's recent decision in *Caterpillar* . . . support this view"). The D.C. Circuit observed that "[i]t is well

established that diversity of citizenship is determined at the time the complaint is filed" and that "[t]he corollary to this rule, that if diversity did not exist when the complaint was filed, it cannot be created by a change of domicile by one of the parties or some other event, appears equally sound and equally well settled." *Id.* (citations omitted).

The D.C. Circuit's holding not only comports with other courts' refusal to ***create*** retroactive diversity jurisdiction based on a party's post-filing change in citizenship (*see* discussion *supra*, pp. 12-14 & n.9), but also comports with other courts' refusal to ***divest*** a court of diversity jurisdiction under those circumstances. This Court consistently and unequivocally has applied the time-of-filing rule to preclude a party's post-filing change in citizenship from destroying diversity jurisdiction once that jurisdiction has been established at the commencement of litigation. *See, e.g.*, *Wisconsin Dep't of Corrections*, 524 U.S. at 391; *Freeport-McMoRan Inc.*, 498 U.S. at 428; *Smith*, 354 U.S. at 93 n.1; *Wichita R.R. & Light Co.*, 260 U.S. at 54; *Smithers*, 204 U.S. at 642-43; *Louisville, New Albany & Chicago Ry. Co.*, 174 U.S. at 563. Scrupulous adherence to the time-of-filing rule likewise should prevent a party's post-filing change in citizenship from creating retroactive diversity jurisdiction.

In refusing to create a new exception to the time-of-filing rule, the D.C. Circuit recognized that the rule must be applied consistently if it is to continue providing a workable mechanism for determining diversity jurisdiction. The D.C. Circuit declined to sacrifice consistency and coherence for potentially illusory gains in judicial economy:

> Although we are mindful of the "considerations of finality, efficiency and economy" that concerned the Supreme Court in *Caterpillar*, those concerns in the

> removal context are insufficient to warrant a departure here from the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed.

Saadeh, 107 F.3d at 57.

Saadeh cannot be distinguished from this case in any meaningful way, and the Fifth Circuit did not attempt to do so. Instead, the Fifth Circuit stated that the D.C. Circuit provided no "analytical justification for its conclusion that removal cases deserve differential treatment." Pet. App. 9a. This criticism is unwarranted because the D.C. Circuit's "analytical justification" is grounded on the longstanding policy considerations governing the strict rules for determining diversity jurisdiction when litigation commences. 107 F.3d at 57 ("Were it necessary to track changes of citizenship throughout litigation, courts would face potentially difficult burdens of either holding cases in abeyance for the diversity requirements to be satisfied or, alternatively, repeatedly adjudicating challenges to previous determinations that diversity jurisdiction existed").

This Court should endorse the D.C. Circuit's analysis in *Saadeh* and apply it in this case to hold that the trial court properly dismissed Atlas' suit for lack of jurisdiction.

IV. The Fifth Circuit's Unwarranted Extension of *Caterpillar* and *Newman-Green* Will Have Pernicious Effects

A. The Interest in Judicial Economy Does Not Justify Recognition of Retroactive Diversity Jurisdiction Predicated on a Party's Unilateral Change in Citizenship

The time-of-filing rule for determining diversity jurisdiction should be enforced in this case for practical and policy reasons. As Judge Garza observed in his dissent, "[W]e cannot fashion jurisdictional rules (or exceptions) solely out of a desire to conserve judicial resources." Pet. App. 18a-19a. The Second Circuit agrees:

> We are aware, in ordering the remand, that this has been an arduous and expensive lawsuit, but subject matter jurisdiction remains "an unwaivable *sine qua non* for the exercise of federal judicial power." We have recently observed that, "jurisdiction is not a game," and that, "as the Supreme Court has made abundantly clear, it is one of the fundamental tenets of our Constitution that only some cases may be brought in federal court." We cannot avoid addressing the threshold question of jurisdiction simply because our finding that federal jurisdiction does not exist threatens to prove burdensome and costly, or because it may undermine an expensive and substantially completed litigation.

Herrick Co. v. SCS Communications, Inc., 251 F.3d 315, 321-22 (2d Cir. 2001) (citations omitted); *see also Dery*, 265 F.2d at 808 ("A rule of procedure, of course, however convenient and salutary it may be, is without efficacy to extend the jurisdiction of a court").

The prospect of a rematch between Dataflux and the reconstituted Atlas partnership should not trump concerns about the difficulties and burdens of applying the Fifth Circuit's new exception. The efficiency concerns raised by the Fifth Circuit must be assessed in light of the circumstances of this case. Even with a retrial, the most expensive element of trial preparation – discovery – can be used again without reinventing the wheel. *Cf. Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 587-88 (5th Cir. 1992) (fact that discovery and legal research would not have to be repeated weighed in favor of dismissal of pendent state-law claims following dismissal of federal claims even after pendent claims had been tried to verdict in federal court). As discussed below, any concerns regarding the lack of efficiency in determining that jurisdiction is lacking after a trial has been conducted, or in conducting another trial, cannot outweigh the larger constitutional and practical considerations undergirding the time-of-filing rule for determining diversity jurisdiction.

B. Judicial Economy Is Threatened by the Fifth Circuit's Unworkable New Exception

The Fifth Circuit justified its new exception to the time-of-filing rule in the name of judicial economy. Pet. App. 11a. In fact, the Fifth Circuit's holding will undermine rather than promote judicial economy.

It is questionable to assume that creating new exceptions to bright-line jurisdictional rules will conserve judicial resources. *Id.* at 18a (Garza, J., dissenting). Carving out an exception in one case merely encourages future litigants to test the limits to that exception or to create new exceptions. *Id.* If courts are willing to create exceptions to the

jurisdictional rules, "parties will cease to believe that any limitations exist." *Id.* at 19a. "Parties will begin filing cases in federal court that would be more appropriately handled by the state judicial system." *Id.*[16] "The Supreme Court in *Caterpillar* did not intend such a result." *Id.*

The ill-defined nature of the Fifth Circuit's new exception makes future litigation over its scope all but inevitable. As Judge Garza stated, "There is no principled way to limit a holding based solely on 'considerations of finality, efficiency and economy.'" *Id.* at 18a. If a litigant can argue that judicial economy requires overlooking a jurisdictional defect identified one day ***after*** the jury returns a verdict, a litigant just as easily can argue that judicial economy also requires overlooking a jurisdictional defect identified ***while*** the jury deliberates – or, for that matter, one day before the jury begins deliberations, or one week before that. Such arguments are sure to follow because "there is no difference in efficiency terms between the jury verdict and, for example, the moment at which the jury retires." *Id.* at 17a. "Nor, for that matter, is there a large difference between the verdict and mid-way through the trial. . . . Indeed, in complicated cases requiring a great deal of discovery, the parties and the court often expend tremendous resources long before the case goes to trial." *Id.* at 17a-18a.

Judge Garza's observations demonstrate that the Fifth Circuit's new exception lacks internal consistency. If that exception becomes the law, it likely will foster exquisite distinctions of this nature as courts struggle to identify the

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16. Commentators already have picked up on the Fifth Circuit's new exception. 18 No. 1 FED. LITIGATOR 6 at 7 (West Jan. 2003) ("This extension of the *Caterpillar* exception . . . opens the door to the creation of jurisdiction that did not initially exist").

tipping point at which federal court litigation has become too mature to worry about threshold defects in subject matter jurisdiction.

Additionally, it is unclear what would constitute a "dispositive ruling" under the Fifth Circuit's new exception. The facts of this case suggest the potential difficulties courts will face in applying that term. Prior to the trial in this case, the trial court granted Dataflux's motion for partial summary judgment on certain aspects of Atlas' breach of contract claim. 3 R. 1270-96. If judicial economy is the only consideration in determining when a defect in jurisdiction must be acknowledged and acted upon, then a trial court's investment of its energies in deciding a motion for partial summary judgment could turn an order on such a motion into a "dispositive ruling" for purposes of the Fifth Circuit's new exception.

In this case, the trial court's 27-page order granting Dataflux's motion for partial summary judgment was entered on August 2, 2000. *Id.* That order was "dispositive" of the claims resolved therein. Atlas' change in citizenship did not take effect until September 8, 2000. Joint App. 126a-127a; Pet. App. 2a; 1 R. 1904, 1906. Under an expansive view of "judicial economy," Atlas' change in its partnership still came too late to salvage jurisdiction because the trial court already had expended significant judicial resources on the case by that time.

The "dispositive ruling" criterion also is likely to create inconsistent and illogical results. Under the literal terms of the Fifth Circuit's new exception, a court of appeals (or even this Court) could not dismiss a case in which the parties initially lacked diversity if the jurisdictional defect was not

identified before a "dispositive ruling" under Federal Rule of Civil Procedure 12(b)(6) – even though minimal judicial resources may have been expended at that stage of the litigation. Yet a trial court would be required to dismiss a case under the new exception if the jurisdictional defect becomes apparent one day before jury deliberations began after a long trial preceded by years of discovery. The latter scenario would involve a far greater consumption of judicial resources.

These problems demonstrate that the underlying efficiency justification offered for the Fifth Circuit's new exception is crippled by the very limits the Fifth Circuit placed on that exception.

C. The Fifth Circuit's New Exception Undermines Other Fundamental Rules Governing Federal Jurisdiction

Close review of the Fifth Circuit's new exception to the time-of-filing rule reveals that the exception is not limited in principle or practice. As shown below, the Fifth Circuit's new exception would adversely impact other fundamental rules governing federal jurisdiction in addition to the time-of-filing rule.

Under existing law, a party opposing federal jurisdiction cannot waive its objections to jurisdiction and may assert those objections at any time. *Wisconsin Dep't of Corrections*, 524 U.S. at 389; *Arizonans for Official English*, 520 U.S. at 73; *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702. The Fifth Circuit's new exception, however, requires a party to object to the lack of jurisdiction before a verdict is returned or a dispositive ruling is made upon pain of being barred

from objecting to jurisdiction. In essence, the new exception puts litigants at risk of waiving what had been an unwaivable objection.

Judge Garza also correctly noted that "[t]he majority's holding is utterly out of step with the long-standing principle that the party who files a case in federal court is responsible for establishing jurisdiction." Pet. App. 15a n.2 (citation omitted); *see also Kokkonen*, 511 U.S. at 377; *McNutt*, 298 U.S. at 189. The Fifth Circuit's new exception significantly changes the burdens imposed on the litigants in at least two respects.

First, the party seeking to invoke federal jurisdiction is no longer required to request court approval to cure a jurisdictional defect by moving to dismiss a non-diverse party or requesting realignment of non-diverse parties. Instead, that party can cure an unnoticed jurisdictional defect simply by changing its citizenship any time before a verdict is returned or a dispositive ruling is made in the case. Second, a party opposing federal jurisdiction currently is required to demonstrate only that diversity jurisdiction did not exist at the time suit was filed. However, under the Fifth Circuit's new exception, that party must establish that there was no diversity jurisdiction at the time a verdict was returned or a dispositive ruling was made. Pet. App. at 11a.

Furthermore, the Fifth Circuit's new exception will allow the jurisdictional door to swing both ways. The Fifth Circuit's new exception was created to ***salvage*** jurisdiction. Once the efficacy of a post-suit change in citizenship is conceded, however, there is no logical or practical impediment to using this mechanism to ***destroy*** diversity jurisdiction after suit has been filed. A court plausibly could conclude that judicial

economy is served by recognizing a post-filing change in citizenship that destroys diversity. For example, a court could conclude that allowing federal jurisdiction to be divested would serve judicial economy by allowing the court to avoid confronting an unsettled question of state law, and thereby avoid the risk of wasting judicial resources by trying a case under the wrong legal standard if the court makes an erroneous *Erie* guess. While it could be decreed that post-filing changes in citizenship will be considered only when they create jurisdiction and not when they destroy jurisdiction, any such distinction would be purely arbitrary.

Even if the Fifth Circuit's new exception could be limited to allow only the creation of retroactive jurisdiction, such a distinction would encourage further manipulation by parties taking advantage of the new exception. For example, if post-filing changes in citizenship under the new exception could create but not destroy diversity, the party who changed its citizenship to manufacture retroactive diversity jurisdiction could restore its original citizenship after verdict without causing the trial court to lose jurisdiction over the case.

The Fifth Circuit's holding in this case does far more than create a new exception to the time-of-filing rule. By relying so heavily on malleable notions of judicial economy, the Fifth Circuit's new exception creates new opportunities for confusion and jurisdictional mischief. This aspect of the Fifth Circuit's new exception makes it an especially unwise departure from settled precedent.

D. The Fifth Circuit's Unwise Extension of Federal Jurisdiction Undermines Principles of Federalism

Even if some degree of wasted effort occasionally may result from strict adherence to the bright-line rules governing diversity jurisdiction, that is the price of policing the boundaries of federal jurisdiction in the service of federalism. Pet. App. 19a (Garza, J., dissenting) (citing *Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996), and *Herrick Co.*, 251 F.3d at 330-31).

This Court long has emphasized that "[f]ederal courts are courts of limited jurisdiction." *Kokkonnen*, 511 U.S. at 377; *see also Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 701 (same). Federal courts "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree," and "[i]t is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen*, 511 U.S. at 377 (citations omitted).

A narrow construction of the federal courts' jurisdiction protects fundamental principles of federalism. As this Court stated in *Ruhrgas AG*:

> Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level.

526 U.S. at 583; *see also Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702 ("Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign").

This Court should not encourage the creation of new methods of asserting jurisdiction over disputes that have been filed improperly in federal court. This argument holds particularly true in diversity cases such as the present one where the sole basis for the federal court's jurisdiction is the fortuitous citizenship of the parties, and where the substantive issues raised in the case are controlled by the application of state rather than federal law.

The Fifth Circuit's decision grants federal courts new authority to adjudicate cases that should have been filed in state court. It does so by creating an unworkable new exception to the time-of-filing rule that will lead to future jurisdictional headaches. This bold and problematic expansion of diversity jurisdiction warrants correction by the Supreme Court.

CONCLUSION

Petitioner Grupo Dataflux asks this Court to reverse the judgment of the court of appeals and to render judgment affirming the trial court's dismissal for lack of subject matter jurisdiction. In the alternative, Dataflux asks this Court to reverse the judgment of the court of appeals and remand the case to the Fifth Circuit for further proceedings consistent with this Court's opinion. Dataflux further requests all other relief to which it may be entitled.

Respectfully submitted,

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No. 02-1689

IN THE

Supreme Court of the United States

GRUPO DATAFLUX,

Petitioner,

v.

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

The underlying facts and procedural history of this case have been discussed thoroughly in the pleadings filed with this Court and in the opinion from the Fifth Circuit ("the Fifth Circuit Opinion"). *See Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168, 169-70 (5th Cir. 2002). Respondents, Atlas Global Group, L.P., Oscar Robles-Canon, and Francisco Llamosa (collectively "Atlas"), will not, therefore, waste the Court's time by stating them yet again.

Atlas will take this opportunity, though, to address a disagreement it has with Petitioner's characterization of the holding in the Fifth Circuit Opinion. Dataflux made the following statement regarding the Fifth Circuit's holding: "The panel majority held that the trial court erred in dismissing Atlas' suit for lack of jurisdiction because: (1) the lack of diversity between Atlas and Dataflux at the time suit was filed was cured shortly before trial by Atlas' unilateral change in citizenship. . . ." (Petitioner's Brief, p. 5). However, the Fifth Circuit specifically rejected Dataflux's argument regarding any purported "unilateral change of citizenship" as a basis for its holding that jurisdiction was proper. *See Atlas Global Group*, 312 F.3d at 172-73. Further, the Fifth Circuit did not rely for its holding on whether the lack of diversity was cured "shortly" before trial. *See id.*

The Fifth Circuit's holding was, instead, as follows:

> In the instant case, this dispute has been completely adjudicated by a federal district court, which had jurisdiction over the parties throughout the trial and at the time the jury rendered its verdict of $750,000 in favor of Atlas. The parties and the

court have committed ample resources to its adjudication. They have had the benefit of a full assessment of the evidence by an impartial jury during a six-day trial. To erase the result of that process by requiring them to re-litigate their claims in state court, or likely in federal court, is not necessary under *Caterpillar*. In so concluding, we remain aware of the limited nature of the district court's jurisdiction and the Supreme Court's caveat against improper expansion of federal jurisdiction. However, this narrow exception applies only where (1) an action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met, (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling has been made by the court, and (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured. If at any point prior to the verdict or ruling, the issue is raised, the court must apply the general rule and dismiss regardless of subsequent changes in citizenship.

Atlas Global Group, 312 F.3d at 174. This is the holding at issue here. For the reasons discussed below, Respondents request that this Court affirm this holding.

SUMMARY OF THE ARGUMENT

This Court should accept the very limited exception created by the Fifth Circuit to the time-of-filing principle.

In *Caterpillar* this Court recognized an exception to the time-of-filing principle, which was applied in the

circumstance that the jurisdictional defect, based on lack of diversity, was cured before the trial commenced, and before the issue was raised by either the parties or the court. The Fifth Circuit applied that exception correctly to the circumstances presented in this case.

Despite Petitioner's argument to the contrary, the Fifth Circuit concluded correctly that the exception recognized in *Caterpillar* is applicable to cases originally filed in federal court and to cases in which a party unilaterally cures the jurisdictional defect. In that regard, this Court did not place any such limitations on the exception. Further, simple fairness demands that the exception be applied uniformly.

In addition to this Court's precedent, policy concerns validate the Fifth Circuit's opinion. As this Court has noted previously, a strong policy of judicial economy weighs in favor of avoiding the waste of judicial resources by dismissing a case after substantial resources have been devoted to its litigation, especially when the complained-of jurisdictional defect was cured before a trial ever commenced. Likewise, the important policy of finality weighs in favor of the Fifth Circuit's holding. If cases such as the one at bar were permitted to be dismissed after findings had been made on the merits, the substantial and dangerous risk of inconsistent fact findings would be created.

ARGUMENT

I. The Fifth Circuit Opinion Applied Correctly This Court's Precedent.

The Fifth Circuit Opinion is merely a correct application of this Court's holding in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). *Caterpillar* was a products liability case brought in state court by a Kentucky resident against Caterpillar and another defendant. *Id.* at 64-65. Caterpillar was a Delaware corporation with its principal place of business in Illinois. *Id.* at 65. The other defendant was a Kentucky corporation with its principal place of business in Kentucky. *Id.* After suit was filed, the plaintiff entered into a settlement agreement with the nondiverse defendant. *Id.* After the settlement, but before the nondiverse defendant was dismissed from the suit, Caterpillar removed the case to federal court, asserting diversity jurisdiction. *Id.* The plaintiff filed a motion to remand, contending that complete diversity was lacking because an intervening plaintiff still had a subrogation claim against the nondiverse defendant. *Id.* at 65-66. The trial court denied the motion to remand. *Id.* at 66. Before the trial began, the subrogation plaintiff settled its claim against the nondiverse defendant, and the trial court dismissed that defendant. *Id.* The trial was completed and judgment was entered in Caterpillar's favor. *Id.* at 67. The Sixth Circuit reversed and vacated the judgment, holding that the case had been improperly removed. *Id.*

On appeal, this Court reversed the Sixth Circuit, and held that because jurisdiction had been cured before trial commenced, jurisdiction was proper and the district court's erroneous denial of the motion to remand was not a sufficient error to warrant vacating the judgment. *Id.* at 73. *Caterpillar* was not the first instance that such an exception to the

time-of-filing principle had been recognized. *See, e.g., Knop v. McMahan*, 872 F.2d 1132, 1139 n.16 (3d Cir. 1989) ("To permit a case in which there is complete diversity throughout trial to proceed to judgment and then cancel the effect of that judgment and relegate the parties to a new trial in a state court because of a brief lack of complete diversity at the beginning of the case would be a waste of judicial resources. It would also encourage litigants to speculate on the jurisdiction issue by saving it for use in the event of a loss.").

As demonstrated below, the Fifth Circuit correctly applied *Caterpillar* to this case.

A. This Court's Opinion In *Caterpillar* Applies To Cases Filed Originally In Federal Court.

1. This Court Did Not Limit Its Holding To Removal Cases.

Dataflux argues that the application of *Caterpillar* should be limited to removal cases. (*See* Petitioner's Brief, pp. 20-26). This Court did not, however, limit its holding in *Caterpillar* to cases that are removed to federal court. *See Caterpillar*, 519 U.S. at 61-78. While it is true that *Caterpillar* did involve a case that was removed, the *Caterpillar* Court's analysis concerning diversity jurisdiction did not focus on removal. This is demonstrated by the method in which the *Caterpillar* Court concluded that jurisdiction existed before the Court ever addressed the issue of removal.

The *Caterpillar* Court began its analysis by noting that the underlying case had proceeded to trial, jury verdict, and judgment. *Id.* at 64-67. The *Caterpillar* Court noted further

that, on appeal, the Sixth Circuit had vacated the judgment for lack of subject matter jurisdiction because complete diversity did not exist when the case was removed. *Id.* at 67. Before the *Caterpillar* Court addressed issues regarding removal procedure, the Court analyzed whether the lack of complete diversity, at the time the case was removed, was a sufficient basis to have deprived the district court of subject matter jurisdiction. *Id.* at 73. The *Caterpillar* Court concluded the Sixth Circuit had erred. *Id.* This Court held that the trial court did have subject matter jurisdiction because "[t]he jurisdictional defect was cured, i.e., complete diversity was established before the trial commenced." *Id.* at 73.

Only after the *Caterpillar* Court concluded that subject matter jurisdiction existed, did it address the issue of removal. *See id.* at 73-78. In particular, the *Caterpillar* Court addressed whether the trial court's error in denying the plaintiff's proper motion to remand was a sufficient "statutory flaw" to warrant sending the case back to the district court for the entire litigation process to be done over. *See id.* Notably, the Court held that even that error was not sufficient to prevent the trial court from entering judgment. *Id.* at 64, 77.

The *Caterpillar* Court never stated any intent to have the application of its reasoning or holding limited to removal cases. *See Caterpillar*, 519 U.S. at 61-78. It is telling that Dataflux has not cited to any portion of the *Caterpillar* decision that supports its position that this Court intended its opinion to be limited to removal cases. As such, Petitioner's assertion that *Caterpillar* be limited to removal cases should be rejected.

2. Cases Filed Originally In Federal Court Should Not Be Subject To Different Rules Regarding Subject Matter Jurisdiction.

Dataflux argues that a case that is filed originally in federal court should be treated differently than one that is removed to federal court. (*See* Petitioner's Brief, pp. 20-26). Dataflux seeks to support this argument with its assertion that the judge and the parties will somehow behave differently in the context of a case removed to federal court than in the context of a case filed originally in federal court. Specifically, that a case will be scrutinized closer in the removal context. (*See* Petitioner's Brief, p. 23). However, in both an originally filed case and a removal case, the same opportunities and obligations to remedy a jurisdictional defect exist.

In the context of removal, it is the party removing the case who has the burden to establish diversity. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Estate of Martineau v. Arco Chem. Co.*, 203 F.3d 904, 910 (5th Cir. 2000). In the context of an original filing, it is the party filing the suit who bears the burden to establish diversity. *See Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991). Regardless of whether a case is removed to, or filed originally in, federal court, the party that seeks to avoid federal jurisdiction has the opportunity to raise the lack of diversity. *See* 28 U.S.C. § 1447(c) (permitting a party to file a motion for remand for lack of subject matter jurisdiction); FED. R. CIV. P. 12(b)(1) (permitting a party to move for dismissal for lack of subject matter jurisdiction). Further, the court can raise the lack of diversity at any time, regardless of whether a case is removed or filed originally in federal court. *See Stafford*, 945 F.2d at 804 (noting that the lack of subject matter jurisdiction can be, and should be, raised by

the court). Considering these well settled principles, it seems illogical that a removal case is subject to greater scrutiny, or that courts should apply a different jurisdictional standard to cases filed originally in federal court.

Another important issue to consider in reference to Petitioner's argument is the fairness of Dataflux's proposition. In the context of removal, the party that is asserting federal jurisdiction is the defendant. *See* 28 U.S.C. § 1441(a); *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 104-05 (1941). By contrast, the plaintiff is the party that asserts federal jurisdiction in a case originally filed in federal court. As such, the interpretation of *Caterpillar* suggested by Dataflux would create a different rule for defendants than for plaintiffs. This is neither a fair application of the law nor is this the application called for under *Caterpillar*.

Ultimately then, as demonstrated above, the mere fact that *Caterpillar* was a removal case is a distinction without a difference. Atlas requests therefore that this Court reject Dataflux's incorrect and unfair suggested interpretation of *Caterpillar*.

B. *Caterpillar* Applies To Cases In Which A Party Unilaterally Cures The Lack Of Complete Diversity.

Dataflux argues that if jurisdiction is cured by a party's own conduct, that party should be excluded from the benefits offered by *Caterpillar*. This interpretation of *Caterpillar* is flawed. A review of *Caterpillar* reveals that this Court did not limit its holding to cases in which the lack of diversity is cured by a party's own conduct. *See Caterpillar*, 519 U.S. at 61-78. Although *Caterpillar* did involve a nondiverse party

that was eliminated through dismissal, the Court's analysis concerning diversity jurisdiction did not focus on how the nondiverse party was eliminated. *See id.* Again, as discussed above, this is demonstrated by the method in which the Court performed its analysis. Namely, the *Caterpillar* Court determined that diversity jurisdiction existed because the lack of diversity was cured "before trial commenced." *Id.* at 73. In reaching this conclusion, the *Caterpillar* Court did not rely, in any way, on how the lack of diversity was cured. *See id.* at 61-78.

Another relevant issue that Dataflux overlooks is that in *Caterpillar*, the lack of diversity was cured, in part, by a unilateral act performed by the parties. In *Caterpillar*, jurisdiction was cured when all claims involving the nondiverse defendant were settled and the court then dismissed the nondiverse defendant from the suit. *See Caterpillar*, 519 U.S. at 64. The district court's conduct in dismissing the nondiverse defendant occurred only after the parties reached their settlement, and the district court's dismissal merely carried out the parties' agreement.[1] Thus, the event that cured the lack of diversity was not performed solely by the court.

Finally, regardless of whether the lack of complete diversity is cured by a unilateral act of a party seeking to assert jurisdiction, the same opportunities and obligations to remedy a defect in jurisdiction discussed above exist before the nondiverse party is eliminated. *See* 28 U.S C. § 1447(c);

1. While it is not clear what part Caterpillar, which was the removing party, played in the settlement, the lack of involvement by the district court in the conduct that led to the curing of the jurisdictional defect is particularly relevant given Petitioner's argument.

FED. R. CIV. P. 12(b)(1); *Wilson*, 257 U.S. at 97; *Estate of Martineau*, 203 F.3d at 910; *Stafford*, 945 F.2d at 804. Namely, a party has several procedural mechanisms available to bring the lack of diversity to the court's attention and the court itself can raise the issue at any time. *See id.*

Atlas requests, therefore, that this Court reject Dataflux's proposed interpretation of *Caterpillar*, which would exclude from its application those parties whose conduct assisted in curing the jurisdictional defect.

C. The Interpretation Of *Caterpillar* Suggested By Dataflux Creates The Danger Of Manipulation Of The Federal Courts.

Dataflux contends, incorrectly, that if parties are permitted to unilaterally correct the lack of complete diversity, such parties can manipulate federal jurisdiction.[2] This erroneous argument has been discounted above. Nevertheless, Petitioner's contention regarding possible manipulation should not be considered without a discussion of the danger of manipulation created if Petitioner's interpretation of *Caterpillar* were to be accepted. In that regard, an unscrupulous defendant could realize that diversity was not complete when the plaintiff filed its complaint. The defendant could then wait for the jury's verdict. If the defendant did not like the verdict, the defendant could merely object based on the lack of jurisdiction, and thereby unwind the entire case, and receive "a second bite at the apple."[3]

2. Dataflux acknowledges that "Atlas was not attempting to manipulate jurisdiction." (Petitioner's Brief, p. 24).

3. Atlas seeks in no way to suggest that Dataflux or its counsel engaged in such inappropriate behavior. Atlas points out the possibility only to demonstrate that an unscrupulous party or counsel could engage in such behavior.

Likewise, the same example would apply in the context of removal if a plaintiff noticed the lack of complete diversity and waited to raise the issue until after the verdict. This clear danger for manipulation creates a further basis for the rejection of Petitioner's argument.

D. *Caterpillar* Applies To Cases In Which The Jury Has Returned A Verdict, But No Judgment Has Been Entered.

Dataflux argued below that *Caterpillar* does not apply to cases in which a verdict has been returned, but judgment has not been rendered. In an abundance of caution, Atlas will address that argument. This Court did not limit its holding in *Caterpillar* to cases in which judgment was entered. *See Caterpillar*, 519 U.S. at 61-78; *see also In re AT&T Fiber Optic Cable Installation Litig.*, No. IP 99-9313-C H/K, 2001 WL 1397295, at #5-7 (S.D. Ind. Nov. 5, 2001) (concluding that *Caterpillar* does not make judgment a prerequisite). In fact, the *Caterpillar* Court stated clearly that the basis for its holding that the trial court had subject matter jurisdiction to enter the judgment was that "[t]he jurisdictional defect was cured, i.e., complete diversity was established *before the trial commenced*." *Caterpillar*, 579 U.S. at 73 (emphasis added).

It is important to note also that if the entry of judgment were required, the same danger of manipulation discussed above would exist. Specifically, either an unscrupulous defendant or plaintiff could wait for the jury's verdict to determine whether it wanted to raise the issue of the lack of jurisdiction. Taking this contention to the absurd, if a trial court were to apply Dataflux's proposed interpretation of *Caterpillar*, that court would be compelled to dismiss a fully litigated case in the following circumstance: a jury verdict

has been returned, the judge is in the process of entering the judgment, and a split second before the judge does so, the defendant objects to the lack of complete diversity at the time the case was filed. It is unlikely this Court intended such a result, especially in light of its statement that jurisdiction existed in *Caterpillar* because diversity was cured "before trial commenced." Atlas requests, therefore, that this Court reject any such argument.

E. *Caterpillar* Applies Without Regard To Whether The Nondiverse Party Is A Party To The Judgment.

Petitioner seeks to avoid the application of *Caterpillar* by arguing that "the parties to the judgment in *Caterpillar* started out diverse and stayed diverse throughout the litigation." (Petitioner's Brief, p. 21). This argument, like Dataflux's other attempts to distinguish *Caterpillar*, fails. First and foremost, this Court did not make any such limitation of its holding in *Caterpillar*. *See Caterpillar*, 519 U.S. at 64, 73. Further, Dataflux glosses over the important point that the lack of diversity existed at the time *Caterpillar* was removed to federal court. (*See* Petitioner's Brief, p. 21) ("The only jurisdictional defect at the time of removal was the initial presence of another defendant who was not diverse from the plaintiff. . . ."). That point is, of course, very significant given the issues presented here. Accordingly, whether the previously nondiverse party is a party to the judgment is of no importance.

F. The Fifth Circuit's Opinion Stated Clearly That It Viewed *Newman-Green* As Only Instructive.

Dataflux argues that the Fifth Circuit erred in relying on *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989) because "*Newman-Green* addressed the narrow question of whether a court of appeals may dismiss a non-diverse dispensable party to cure a jurisdictional defect, or whether the appellate court must remand the case to the district court to determine if dismissal is proper." (Petitioner's Brief, p. 26). Dataflux is mistaken in its reading of the Fifth Circuit Opinion. The Fifth Circuit stated clearly that *Newman-Green* is distinguishable from the present case, and that it saw *Newman-Green* as only instructive in addressing the current case. In particular, the Fifth Circuit stated the following:

> Although *Newman-Green* is distinguishable because Rule 21 is not at issue in the case before us, we find its underlying policy theme instructive. The Court in *Newman-Green* stressed that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." It is this rationale that persuaded the Court in *Newman-Green* and again in *Caterpillar*.

Atlas Global Group, 312 F.3d at 171.

It bears noting that in *Caterpillar*, this Court likewise noted that while *Newman-Green* was distinguishable from the facts in *Caterpillar*, the policy concerns detailed in *Newman-Green* were "instructive." *See Caterpillar*, 519 U.S. at 75-76. In light of Dataflux's incorrect reading of the Fifth

Circuit Opinion, Atlas urges the Court to reject Dataflux's assertion that the Fifth Circuit erred by considering *Newman-Green* in its analysis of this case.

II. The *Saadeh* Opinion Is Not Persuasive.

Dataflux argues that the Fifth Circuit Opinion conflicts with the D.C. Circuit's decision in *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). In *Saadeh*, complete diversity did not exist when the plaintiff filed his complaint, but was later created. *Id.* at 53-54. Before trial, the defendant raised the previous lack of diversity in a motion to dismiss. *Id.* at 54. The trial court denied the motion. *Id.* at 54. On appeal, the D.C. Circuit considered this Court's holding in *Caterpillar*. *Id.* at 57. The D.C. Circuit refused to apply *Caterpillar*. *Id.* at 57. In doing so, the D.C. Circuit did not, however, provide analysis to support its rejection of *Caterpillar*. Specifically, the *Saadeh* Court stated the following:

> In *Caterpillar*, a removal case involving non-diverse parties, the district court denied a timely motion to remand and entered judgment following a jury trial. The Supreme Court, noting that as the result of a settlement resulting in dismissal of the non-diverse defendant, allowed the judgment to stand on the ground that considerations of finality, efficiency, and economy were paramount. . . . Although we are mindful of the considerations of finality, efficiency and economy that concerned the Supreme Court in *Caterpillar*, those concerns in the removal context are insufficient to warrant a departure here from

> the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed.

Id. at 57 (citations omitted).

The Fifth Circuit considered *Saadeh*, but rejected it "[b]ecause *Saadeh* does not provide any analytical justification for its conclusions that removal cases deserve differential treatment. . . ." *Atlas Global Group*, 312 F.3d at 173. A review of *Saadeh* reveals that, as noted in the Fifth Circuit Opinion, the *Saadeh* Court did not set out analysis to support its conclusions. Specifically, the *Saadeh* Court does not explain why it believed this Court intended *Caterpillar* to be limited to removal cases. *See Saadeh*, 107 F.3d at 57. Further, the *Saadeh* Court did not explain why a removal case should receive different treatment. *See id.* In light of the lack of analysis in *Saadeh*, the opinion does not provide a basis to overcome clear Supreme Court precedent. Atlas urges this Court, therefore, to reject *Saadeh*.

III. Policy Concerns Support The Fifth Circuit Opinion.

A. Judicial Economy Weighs In Favor Of The Fifth Circuit Opinion.

Dataflux contends that judicial economy does not support the Fifth Circuit Opinion. (Petitioner's Brief, pp. 31-35). Dataflux argues that if the Fifth Circuit Opinion is permitted to stand, it will increase consumption of judicial resources over time as litigants "test the limits" of the Fifth Circuit Opinion. Dataflux is mistaken.

The Fifth Circuit Opinion stated the following about judicial economy:

> In the instant case, this dispute has been completely adjudicated by a federal district court, which had jurisdiction over the parties throughout the trial and at the time the jury rendered its verdict of $750,000 in favor of Atlas. The parties and the court have committed ample resources to its adjudication. They have had the benefit of a full assessment of the evidence by an impartial jury during a six-day trial. To erase the result of that process by requiring them to re-litigate their claims in state court, or likely in federal court, is not necessary under *Caterpillar*.

Atlas Global Group, 312 F.3d at 174.[4]

In reaching its conclusion, the Fifth Circuit Opinion noted that *Newman-Green* was instructive on the issue of judicial economy. The Fifth Circuit Opinion pointed specifically to the portion of *Newman-Green* that "stressed that 'requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.'" *Atlas Global Group*, 312 F.3d at 171 (quoting *Newman-Green*, 490 U.S. at 836). The Fifth Circuit considered also the following statements by the *Caterpillar*

4. In addition to the jury verdict against Dataflux, the jury also found against Dataflux on its third-party claims against two individual plaintiffs. Under Dataflux's interpretation of *Caterpillar*, the verdict on the third-party claims would likewise be erased, thereby requiring the parties to retry those issues. Clearly, this would also cut against the policy of judicial economy.

Court about judicial economy: "Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Atlas Global Group*, 312 F.3d at 172 (quoting *Caterpillar*, 519 U.S. at 75, 77).

Despite the Fifth Circuit Opinion's clear reliance on Supreme Court statements regarding judicial economy, Dataflux seeks to challenge these principals with its apparent contention that courts should not seek to apply exceptions to general rules because future litigants may seek to broaden the application of the exceptions. Dataflux does not, however, cite any authority for such a proposition. Considering the lack of authority for such a proposition, and the general absurdity of the idea that a court should refrain from applying a necessary exception merely because future litigants may ask the court to extend the application, Atlas urges the Court to reject Dataflux's argument and to conclude instead that judicial economy weighs in favor of the Fifth Circuit Opinion.

B. The Fifth Circuit Opinion Is Sufficiently Limited.

Petitioner contends that the exception created by the Fifth Circuit Opinion is too broad. (Petitioner's Brief, pp. 32-39). To the contrary, the Fifth Circuit limited the bounds of its holding, which thereby makes the limits of the exception clear. In fact, as if anticipating the argument, the Fifth Circuit held as follows:

> [W]e remain aware of the limited nature of the district court's jurisdiction and the Supreme Court's caveat against improper expansion of federal jurisdiction. However, this narrow

> exception applies ***only*** where (1) an action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met, (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling has been made by the court, and (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured. If at any point prior to the verdict or ruling, the issue is ***raised***, the court must apply the general rule and dismiss regardless of subsequent changes in citizenship.

Atlas Global Group, 312 F.3d at 174 (emphasis added).

Based on this holding, the test of whether a jurisdictional defect has been timely cured is clear. Jurisdiction will be proper if the defect is cured (1) before it is raised by the court or the parties; and (2) before a jury verdict is rendered or a dispositive ruling is made. These are very specific events. In addition, it bears noting that the Fifth Circuit has circumscribed the exception to an even greater degree than the limit set by this Court in *Caterpillar*. In *Caterpillar*, this Court found the relevant time to be before the trial commenced, whereas the Fifth Circuit made the further limitation of when the jury verdict has been rendered. Respondents request, therefore, that this Court conclude that the Fifth Circuit Opinion is sufficiently restrictive.

C. The Fifth Circuit Opinion Prevents Inconsistent Fact findings.

The policy concern of preventing inconsistent factfindings also weighs in favor of the Fifth Circuit Opinion. In particular, if the law were not as set out in *Caterpillar* and the Fifth Circuit Opinion, the danger of inconsistent findings

would be created. Namely, as in this case, a party could receive a jury verdict, have its case dismissed, go through the entire litigation process again, and have a jury reach a different verdict. The Fifth Circuit Opinion, as written, prevents such an inconsistent result. Atlas asks the Court to maintain that protection by affirming the Fifth Circuit Opinion.

CONCLUSION

For the reasons stated above, it is evident that the Fifth Circuit Opinion is correct, and supported by clear Supreme Court precedent and policy principles. Accordingly, Respondents ask that this Court affirm the judgment of the court of appeals. Atlas requests further all other relief to which it may be entitled.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GRUPO DATAFLUX,

Petitioner,

v.

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page ii of Petitioner's Opening Brief, and there are no amendments to that Statement.

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SUMMARY OF ARGUMENT

Atlas acknowledges that the Fifth Circuit created a new exception to the longstanding rule requiring a party's citizenship to be determined at the time suit is filed. *See* Br. for Respondents at 2. Atlas relies almost exclusively on *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), to support this new exception. *Caterpillar* cannot bear the weight Atlas would have it carry. *Caterpillar* did not address the circumstances presented in this case, and Atlas cannot convert *Caterpillar*'s silence into an endorsement of retroactive diversity jurisdiction based on post-filing changes in citizenship.

Atlas not only fails to find any dispositive language in *Caterpillar*, but also fails to identify any statute or rule that permits unilateral changes in citizenship to create subject matter jurisdiction after suit is filed. Atlas does not address the existence of 180 years of precedent applying the time-of-filing rule to changes in citizenship or the impact that history has on the interpretation of 28 U.S.C. § 1332(a). Atlas does not address the conflict between the Fifth Circuit's new exception and fundamental principles of jurisdiction, including the presumption against federal jurisdiction, the non-waivability of defects in subject matter jurisdiction, and a court's duty to dismiss when subject matter jurisdiction is lacking.

Atlas further fails to address the ramifications of the new rule it asks this Court to endorse, including the impact of such a rule on the principle that post-filing changes in citizenship cannot divest a court of diversity jurisdiction once it has been established. While Atlas contends in conclusory fashion that the Fifth Circuit's new exception is limited,

Atlas does not address the practical problems likely to flow from this new rule. *See* Br. for Respondents at 17-18; *compare* Br. for Petitioner at 18 n.12, 32-39.

The dispositive issue in this case is whether unilateral changes in a party's citizenship after suit is filed should be allowed to create diversity jurisdiction that did not exist at the time suit was filed. *See* Pet. for Writ of Cert. at i; Br. for Petitioner at i. The Court was not called upon to consider this issue in *Caterpillar*, and it did not do so. Under the time-of-filing rule, post-filing changes in citizenship do not affect the determination of whether diversity exists. Congress repeatedly has amended and re-enacted the statutory provisions governing diversity jurisdiction against the backdrop of this rule, thereby making it part of the fabric of congressional enactments.

Invocations of judicial economy are insufficient to overcome this longstanding interpretation and understanding of the diversity statute. In any event, the new problems created by the Fifth Circuit's new exception far outweigh any asserted benefit from rewriting 180 years of jurisprudence to resurrect a single six-day jury trial.

ARGUMENT

I. Atlas Misplaces Its Reliance on *Caterpillar*

Atlas relies on *Caterpillar* as support for the Fifth Circuit's new exception to the time-of-filing rule, but fails to cite any language in *Caterpillar* specifically authorizing the creation of diversity jurisdiction based on a party's

unilateral change in citizenship after suit is filed.[1] Instead, Atlas contends that the Fifth Circuit's rewrite of fundamental jurisdictional rules governing citizenship is permissible because nothing in *Caterpillar* expressly forbids such a rewrite. *See* Br. for Respondents at 3, 5, 6, 8, 12. This argument misses the point.

If the Court had intended in *Caterpillar* to overrule 180 years of precedent governing the time-of-filing rule as applied to changes in citizenship, such a far-reaching change presumably would have merited discussion in the Court's opinion. *Caterpillar* addressed only the circumstances presented in that case, and the Court's silence with respect to circumstances that were not presented does not suggest that lower courts are free to ignore well-settled jurisdictional principles governing the time at which citizenship is measured. This conclusion is underscored by an analysis of the pertinent statutory provisions.

A. *Caterpillar* Does Not Address the Circumstances Presented in This Case

Atlas errs in suggesting that an opinion addressing the impact of dismissing non-diverse parties under 28 U.S.C. §§ 1441 and 1446(b) implicitly undermines the time-of-filing

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1. Atlas quibbles with Dataflux's description of the Fifth Circuit's new exception. *See* Br. for Respondents at 1-2. The precise nature of Atlas' objection is unclear; the significance of the Fifth Circuit's change in settled law is not. Although the panel majority tried to downplay the magnitude of this change, the majority nonetheless acknowledged that retroactive creation of diversity jurisdiction by means of Atlas' post-filing change in citizenship differs from the dismissal mechanism analyzed in *Caterpillar*. *See* Pet. App. 8a-9a.

rule for changes in citizenship under 28 U.S.C. § 1332(a). *See* Br. for Respondents at 5-6.

1. Congress and the Courts Have Long Applied the Time-of-Filing Rule to the Determination of Citizenship Under Section 1332(a)

Atlas' error stems from its failure to appreciate that the jurisdictional issue in *Caterpillar* differs from the attempted jurisdictional fix in this case. *See* Br. for Respondents at 6 (quoting *Caterpillar Inc.*, 519 U.S. at 73). Dismissal of non-diverse parties sets the stage for removal under 28 U.S.C. §§ 1441 and 1446(b) in certain circumstances. Dismissal in the removal context is fundamentally different from discarding the time-of-filing rule in a non-removal context and giving effect to post-filing changes of citizenship under 28 U.S.C. § 1332(a).

As discussed in Dataflux's opening brief, the time-of-filing rule with respect to changes in citizenship has been followed for 180 years. *See* Br. for Petitioner at 10-14. The current diversity statute and its predecessors consistently have been interpreted to require the determination of citizenship at the time suit is filed, and to require subsequent changes in citizenship to be disregarded. *Id.* Congress' actions over the years in repeatedly re-enacting and amending the diversity statute while leaving intact the time-of-filing rule with respect to changes in citizenship clearly demonstrate a congressional mandate to determine citizenship under Section 1332(a) at the time suit is filed. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978) (consistent interpretation of Section 1332 and its predecessors to require complete diversity of citizenship, and Congress' repeated re-enactment and amendment of statute leaving complete

diversity requirement intact, "clearly demonstrates a congressional mandate" requiring complete diversity); *see also Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (re-enactment of statute "generally includes the settled judicial interpretation"); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (re-enactment of statute without change generally evidences intent to adopt judicial interpretation of statute).

It follows that the Fifth Circuit's new rule – at the very least – contravenes 28 U.S.C. § 1332(a) as interpreted to incorporate the time-of-filing rule governing post-filing changes in citizenship. *See* Br. for Petitioner at 10-14.[2]

2. The limits on diversity are both constitutional and statutory. *See* Br. for Petitioner at 16-17; *Owen Equip. & Erection Co.*, 437 U.S. at 372; *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967). The dissent below concluded that this case involves not only a lack of statutorily required complete diversity, but also an absence of constitutionally required minimum diversity. *See* Pet. App. 13a ("Therefore, the parties were not completely diverse. Indeed there was *no* diversity between the parties") (emphasis in original). Complete diversity involves a situation "where more than one plaintiff sues more than one defendant" so that "each plaintiff must be capable of suing each defendant." *Soderstrom v. Kungsholm Baking Co.*, 189 F.2d 1008, 1013-14 (7th Cir. 1951) (citing *Levering & Garrigues Co. v. Morrin*, 61 F.2d 115, 117 (2d Cir. 1932), and *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806)). This case does not involve multiple plaintiffs with different individual citizenships; it involves a single plaintiff with multiple citizenships. *See* Br. for Petitioner at 3. The dissent's statement suggests Atlas' Mexican citizenship at the time suit was filed means that constitutional diversity requirements were not satisfied because only one plaintiff sued only one defendant, and both were Mexican citizens at that time. *See* Pet. App. 13a; *see also Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809) (no constitutional authority for diversity jurisdiction over suit wholly between aliens); *compare Signature*

(Cont'd)

This point is reinforced by the differences between the general diversity statute governing this case and the specific provisions of the removal statute at issue in *Caterpillar*.

2. *Caterpillar* Focused on a Different Procedure Governed by a Different Statute

In contrast to a case originally filed in federal court, removal involves additional statutory provisions and different considerations. *See* 14B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3723 at 571 (3d ed. 1998) ("But the practice in the removal context is somewhat different than it is for actions filed originally in the federal courts, in which . . . diversity is determined on the basis of the parties' citizenship at the time of commencement of the action"). This separate statutory structure was the focus of the Court's analysis in *Caterpillar*. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 43 (1998); *Caterpillar Inc.*, 519 U.S. at 75-77. Congress has expressly provided an exception to the time-of-filing rule in the removal context under certain circumstances, such as the dismissal of non-diverse parties. Congress has not provided

(Cont'd)
Props. Int'l L.P. v. City of Edmond, 310 F.3d 1258, 1260 n.1 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2273 (2003) (characterizing lack of diversity based upon multiple citizenships of partnership as failure of complete diversity). However, even assuming for argument's sake that constitutional requirements were satisfied by Atlas' additional non-Mexican citizenships, the Fifth Circuit's new exception still must be rejected because it violates the statutory requirements for diversity jurisdiction as interpreted in light of longstanding precedent. *See Owen Equip. & Erection Co.*, 437 U.S. at 371-74; *Zahn v. International Paper Co.*, 414 U.S. 291, 292-302 (1973).

such an exception under 28 U.S.C. § 1332(a) for post-filing changes in a party's citizenship.

The general rule in the removal context requires diversity both at the time of filing and at the time of removal. *See, e.g., La Confiance Compagnie Anonyme D'Assurance v. Hall*, 137 U.S. 61, 62 (1890). Under 28 U.S.C. § 1446(b), however, removal on diversity grounds is permitted up to one year after commencement of the action even when "the case stated by the initial pleading is not removable" if circumstances have changed to meet diversity requirements after the time of filing. 28 U.S.C. § 1446(b). This section comes into play when a plaintiff voluntarily dismisses a diversity-spoiling party. *See, e.g., In re Iowa Mfg. Co.*, 747 F.2d 462, 463 (8th Cir. 1984) (per curiam) ("[I]f the plaintiff voluntarily dismisses the non-diverse defendant, the case may be removed"). Section 1446(b) thus demonstrates a congressional intent to relax the time-of-filing rule in the removal context when the jurisdictional defect can be cured by dismissal of a non-diverse party.[3]

No congressional intent to relax the time-of-filing rule with respect to citizenship is evidenced under 28 U.S.C. § 1332(a). That provision contains no language comparable to Section 1446(b) and contains no language creating an

3. Even in that circumstance, the decision whether to remove is the defendant's choice to make. *See* 28 U.S.C. § 1441(a). The plaintiff cannot voluntarily act and then use its own action as a unilateral mechanism for removing the case. *Id.* The voluntary dismissal exception to the time-of-filing rule prevents a plaintiff from unilaterally defeating removal by joining a non-diverse defendant and then dismissing that defendant after diversity jurisdiction has been destroyed. *See* 14B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3723 at 574 (3d ed. 1998).

exception to the time-of-filing rule as applied to changes in citizenship. On the contrary, the multiple amendments and re-enactments of the diversity statute made in light of settled judicial interpretation applying the time-of-filing rule to changes in citizenship indicate a congressional intent to leave the time-of-filing rule intact. *See Owen Equip. & Erection Co.*, 437 U.S. at 371-74; *Zahn*, 414 U.S. at 292-302.[4]

Atlas complains that these distinctions treat removed cases differently from cases originally filed in federal court, and that they treat plaintiffs differently from defendants. *See* Br. for Respondents at 7-8. Perhaps the short answer is that different rules apply because Congress has chosen to apply different rules. That choice is appropriately left to Congress. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 197 (1990) ("[T]he course we take today does not so much disregard the policy of accommodating our diversity jurisdiction to . . . changing realities . . . as it honors the more important policy of leaving that to the people's elected representatives").

4. Indeed, Congress amended 28 U.S.C. § 1332(a) in 1958 and again in 1988 in part to ***decrease*** the number of cases filed in federal court based on diversity jurisdiction. S. REP. NO. 1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101; H.R. REP. No. 100-889 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6005. In connection with the 1958 amendment of 28 U.S.C. §1332(a), the Senate stated that a key change to the then-"present law [was] the increase of the amount in controversy from $3,000 to $10,000." S. REP. No. 1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3099. The amount-in-controversy threshold was increased to $50,000 in 1988 and again in 1996 to its current level of $75,000. *See* 28 U.S.C. § 1332(a). Expanding diversity jurisdiction in the manner advocated by Atlas and the Fifth Circuit thus contravenes congressional intent to restrict diversity jurisdiction.

Congress can expand or contract diversity jurisdiction within the boundaries permitted by Article III, and in so doing it can decree that procedures will operate differently for plaintiffs and defendants. *See, e.g.*, 28 U.S.C. § 1367(b) ("[T]he district courts shall ***not*** have supplemental jurisdiction under subsection (a) over claims ***by plaintiffs*** against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure" if inconsistent with Section 1332) (emphasis added); *see also* 28 U.S.C. § 1441(a) (permitting removal "***by the defendant or the defendants***" but not by plaintiff) (emphasis added).

Invocations of judicial economy cannot override the limits Congress has considered, adopted, and chosen to leave undisturbed. *See Owen Equip. & Erection Co.*, 437 U.S. at 377.[5] Allowing the existing limits on diversity "to be circumvented . . . would simply flout the congressional command." *Id.*

B. Because *Caterpillar* Did Not Address the Circumstances Presented in This Case, No Recognition of Post-Filing Changes in Citizenship Can Be Implied

These settled limits on diversity jurisdiction confirm that the D.C. Circuit properly refused to extend *Caterpillar* beyond the removal context. *Saadeh v. Farouki*, 107 F.3d

5. If Congress concludes legislative action is warranted to address considerations of judicial economy in this jurisdictional context, Congress is free to take such action just as it did in 1990 when it codified aspects of pendent and ancillary jurisdiction by enacting the supplemental jurisdiction statute. *See* 28 U.S.C. § 1367.

52, 56-57 (D.C. Cir. 1997).[6] These limits also confirm that Atlas overreaches when it tries to transform *Caterpillar*'s silence on an issue that was not presented into an implicit endorsement of post-filing changes in citizenship. *See* 15 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 102.21[1] (3d ed. 2003) (The *Caterpillar* exception "is strictly limited . . . and is not a general principle that lack of diversity can be ignored if substantial judicial resources have been invested before it is discovered").

The Court's silence on post-filing changes in citizenship in *Caterpillar* should not be construed as a tacit overruling of 180 years of precedent. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 303 (1973) (White, J., concurring) ("Normally, a court's silence on an important question would simply indicate that it was unnecessary to decide the issue because it was not properly before the court or for some other reason"). The resolution of this case should be grounded on what this Court affirmatively said in *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537 (1824), and in subsequent cases, rather than on what the Court ***did not say*** in *Caterpillar*. *See* Br. for Petitioner at 10-14.

Apart from *Caterpillar*'s silence, Atlas proffers a handful of additional arguments in support of the Fifth Circuit's new exception. These arguments do not withstand scrutiny.

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6. Contrary to Atlas' contention, the D.C. Circuit did not "reject" *Caterpillar*. *See* Br. for Respondents at 14. Rather, the D.C. Circuit recognized that *Caterpillar* 's removal-based analysis should not be transplanted to a case that does not involve removal and dismissal. *See Saadeh*, 107 F.3d at 56-57.

C. Atlas Advocates a New Rule Under Which Jurisdictional Defects May Be Cured Without Notice or Court Participation

Atlas asserts that "the event that cured the lack of diversity was not performed solely by the court" in *Caterpillar*. *See* Br. for Respondents at 9. Atlas once again misses the point. Even if the procedural steps utilized in *Caterpillar* were not undertaken solely by the district court, that court nonetheless had significant involvement and exercised significant control over the process – an involvement that this Court recognized would prevent manipulation by litigants. *See Caterpillar Inc.*, 519 U.S. at 77 ("The procedural requirements for removal remain enforceable by the federal trial court judges to whom those requirements are directly addressed. . . . The well-advised defendant, we are satisfied, will foresee the likely outcome of an unwarranted removal – a swift and nonreviewable remand order"). Here, in contrast, Atlas and the Fifth Circuit advocate a jurisdictional maneuver accomplished exclusively by Atlas without notice to the parties or the court and without court participation, which could encourage manipulation in future cases. This is a far different and far more troubling proposition.

D. The Line for Determining the Parties' Citizenship Already Has Been Drawn at the Time of Filing

Atlas erroneously attributes to Dataflux an argument that the line for determining the parties' citizenship should be drawn according to whether judgment has been entered. *See* Br. for Respondents at 11.

Dataflux asks this Court to continue drawing the line where it has been drawn since 1824 – at the time suit is filed. *See Mollan*, 22 U.S. (9 Wheat.) at 539. The fact that judgment had not yet been entered in this case at the time Dataflux raised the jurisdictional defect is significant only insofar as *Caterpillar* referenced the existence of a final judgment as an additional factor meriting consideration in the removal context. *See Caterpillar Inc.*, 519 U.S. at 77. Even if one were to assume for argument's sake that *Caterpillar*'s reasoning could be transplanted from a removal context to a non-removal context, the absence of any final judgment in this case would be a distinguishing factor in Dataflux's favor. But Atlas loses sight of Dataflux's main point: "[A] court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct. . . ." *Kontrick v. Ryan*, 2004 U.S. LEXIS 663, at *26 (Jan. 14, 2004).[7] Longstanding precedent establishes that even ***after*** judgment has been entered, the losing party still can raise the lack of diversity jurisdiction at any time and may do so in the Supreme Court in the first instance. *Id.* at *24 (citing *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804)).

7. Because the time-of-filing rule establishes the line applicable in this case, Atlas cannot obtain any traction by emphasizing that a motion to dismiss was filed in *Saadeh* before trial. *See* Br. for Respondents at 14 (citing *Saadeh*, 107 F.3d at 54). Under the bright-line rule applied by the D.C. Circuit in *Saadeh*, the exact time at which the jurisdictional defect was raised is immaterial. If the jurisdictional defect exists at the commencement of litigation, that defect must be acted on no matter when it is recognized. *See Kontrick*, 2004 U.S. LEXIS 663, at *24.

E. *Newman-Green* Provides No Assistance to Atlas

Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989), reiterated the general rule requiring diversity jurisdiction to be decided on the facts as they exist at the time suit is filed. This Court observed at the outset of its analysis that an exception to the time-of-filing rule had to exist in order for the rule to be overcome. *Id.* The Court determined that Federal Rule of Civil Procedure 21 provided such an exception under the circumstances of that case. *Id.* at 833. Even Atlas acknowledges that *Newman-Green* is distinguishable because it involved court-supervised dismissal rather than an unsupervised change in citizenship. *See* Br. for Respondents at 13.

Atlas nonetheless asserts that *Newman-Green* is "instructive." *Id.* As this Court recognized in *Keene Corporation v. United States*, 508 U.S. 200, 208 n.3 (1993), the "instructive" capacity of *Newman-Green* has its limits and does not encompass circumstances beyond dismissal of a diversity-spoiling litigant under Rule 21. Atlas has identified no statute or rule supporting the Fifth Circuit's new exception.

Lacking support in the rules, statutes, or case law, Atlas raises a number of practical and policy-based arguments to justify the Fifth Circuit's new exception. This tack also fails.

II. Atlas' Arguments Do Not Justify Departing From the Settled Time-of-Filing Rule as Applied to Changes in Citizenship

A. If a Court Can Raise Lack of Subject Matter Jurisdiction at Any Time, Litigants Can Do So as Well

Atlas largely ignores the practical problems flowing from the Fifth Circuit's new exception to the time-of-filing rule. To the extent Atlas attempts to address them, Atlas suggests that a court, on its own initiative, could raise a threshold lack of diversity jurisdiction at any time – even if the litigants themselves could not do so after a dispositive ruling or verdict under the Fifth Circuit's new rule. *See* Br. for Respondents at 7, 10. Atlas' *ad hoc* attempt to minimize the damage the Fifth Circuit's new exception will inflict on existing jurisprudence fails on several fronts.[8]

The Fifth Circuit's decision does not expressly or implicitly recognize Atlas' suggested exception to the exception. Additionally, Atlas' exception would fatally undermine the very rule it seeks to uphold. While the Fifth Circuit's rule would bar parties from filing a motion to dismiss a case for lack of diversity jurisdiction after a dispositive ruling or verdict, nothing would stop parties from simply informing the court that a jurisdictional defect exists – which would require the court to dismiss the case. FED. R. CIV. P. 12(h)(3).

8. In addition to disregarding 180 years of jurisprudence enforcing the time-of-filing rule with respect to changes in citizenship, the Fifth Circuit's new exception also contravenes Federal Rule of Civil Procedure 12(h)(3), which requires a court to dismiss a case "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter."

Atlas' suggestion is even more unworkable than the new exception formulated by the Fifth Circuit. No useful purpose would be served by making a threshold determination of subject matter jurisdiction dependent upon whether the defect is discovered by the court on its own, or is instead brought to the court's attention by one of the litigants. If subject matter jurisdiction is lacking, it should not matter who first discovers the problem.

B. Applying the Settled Rule Will Not Create an Incentive to Refrain From Identifying Jurisdictional Flaws

Having failed to address the prospects for manipulation and confusion created by the Fifth Circuit's new rule, Atlas attempts unsuccessfully to imagine scenarios involving manipulation under the traditional time-of-filing rule. *See* Br. for Respondents at 10-11.

A defendant is not likely to wait for the jury's verdict before deciding whether to complain of a threshold jurisdictional defect it became aware of earlier. Little incentive exists to use such a strategy because the lack of jurisdiction cuts both ways. If a defendant wins at trial knowing a defect exists in subject matter jurisdiction, the defendant's win is subject to being negated just as thoroughly as a plaintiff's win.

Because a lack of subject matter jurisdiction cuts both ways and the parties cannot know who will prevail in the trial court until all proceedings are complete, no real incentive exists to lie behind the log. To the contrary, renewed emphasis on the bright-line rule requiring citizenship to be determined at the time suit is filed would provide renewed incentive for

courts and litigants alike to scrutinize subject matter jurisdiction at the outset of litigation.

C. Atlas Cannot Plausibly Contend That "Inconsistent Factfindings" Justify Refusing to Enforce the Time-of-Filing Rule

Atlas errs when it contends that the Fifth Circuit's new rule serves public policy interests by preventing "inconsistent factfindings." Br. for Respondents at 18-19. Once the court dismisses a case for lack of jurisdiction, the judgment and any verdict upon which judgment is based become void. *See, e.g.*, 11 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2862 (2d ed. 1995) (judgment by court that lacks subject matter jurisdiction over case is void); *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996) (same). Because the original verdict and judgment are void, they have no legal effect. Even if a subsequent trial yields a different verdict, a retrial following dismissal for lack of jurisdiction is no more of a problem than a retrial after an appellate court reverses the original judgment and remands for a new trial. FED. R. CIV. P. 59(a).

Atlas also overlooks that federal courts already are obligated to dismiss a case at any stage of the litigation (post-verdict or otherwise) when an initial lack of subject matter jurisdiction becomes apparent. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Atlas does not and could not suggest that federal courts create an insurmountable problem when they fulfill this existing obligation.

D. Judicial Economy Does Not Outweigh All Other Considerations

Atlas is left to argue that considerations of judicial economy must trump all threshold jurisdictional requirements in this case. *See* Br. for Respondents at 15-17. This argument is not enough to overcome 180 years of precedent requiring determination of the parties' citizenship at the time suit is filed.

This Court has not hesitated to enforce fundamental subject matter jurisdictional requirements even when those requirements mandate dismissal after trial and judgment, and even in the face of protests that doing so sacrifices judicial economy. *See Owen Equip. & Erection Co.*, 437 U.S. at 377. As the Court has emphasized, "[N]either the convenience of the litigants nor considerations of judicial economy can suffice to justify extension" of federal jurisdiction beyond its prescribed limits. *Id.*

The Court's words in *Owen* apply with equal force in this case.

CONCLUSION

Petitioner Grupo Dataflux asks this Court to reverse the judgment of the court of appeals and to render judgment affirming the trial court's dismissal for lack of subject matter jurisdiction. In the alternative, Dataflux asks this Court to remand the case to the Fifth Circuit for further proceedings consistent with this Court's opinion. Dataflux further requests all other relief to which it may be entitled.

Respectfully submitted,

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